Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

THE HOUSING AUTHORITY OF THE CITY OF DALLAS,

Petitioner,

vs.

HIGHLANDS OF MCKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil rights defendant must defy every remedial order and willfully place himself in contempt in order to avoid liability for attorney's fees under 42 U.S.C. §1988.

2. Whether a civil rights defendant must oppose every request for remedial relief in order to avoid liability for attorney's fees under 42 U.S.C. §1988.

3. Whether the Respondents are entitled to recover attorney's fees after failing to attain their litigation objectives in any material or realistic way.

LIST OF PARTIES

Petitioner

The Housing Authority of the City of Dallas

Respondents – the Homeowners

Highlands of McKamy IV and V Community Improvement Association
Debbie Cox, President
Preston Highlands Homeowners' Association, Inc.
Bob Baggett
David Beer
Ginger Lee

Additional Defendants in the District Court, Which Are Not Parties to the Appellate Proceedings

The City of Dallas, Texas
United States Department of Housing and Urban Development

Additional Plaintiffs in the District Court, Who Are Not Parties to the Appellate Proceedings

Debra Walker
Jeanette Washington
Hazel Williams
Zelma Lang
Renita Brown
Lillie Thompson
Tracey Smith

CORPORATE DISCLOSURE STATEMENT

This Corporate Disclosure Statement is submitted pursuant to Supreme Court Rule 29.6. The Petitioner, The Housing Authority of the City of Dallas, is a governmental agency funded primarily by the United States Department of Housing and Urban Development. Petitioner, being a governmental entity, has no parent corporation and no stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Fifth Circuit Court of Appeals in the case of *Walker, et al. v. City of Mesquite, et al.*, 313 F.3d 246 (5th Cir. 2002).

OPINIONS BELOW

This petition arises from a civil rights class action lawsuit brought by a group of African-Americans receiving or eligible to receive housing assistance through programs administered by the Petitioner, The Housing Authority of the City of Dallas[1] (hereinafter "Housing Authority" or "DHA"). The district court found the Housing Authority liable for racial discrimination in the administration of its public housing programs.

As part of the remedy for that past racial discrimination, the district court ordered the Housing Authority to buy or build public housing in "predominantly white areas." The Remedial Order is attached at Appendix D (the "Remedial Order").

Attempting to comply with the district court's order, the Housing Authority purchased two unimproved tracts

[1] The Plaintiff class is defined in the *Agreed Order Certifying Rule 23(b)(2) Class*, entered January 19, 2001, as "all African-American persons who, in the past, currently, or in the future: (i) lived or live in public housing, or (ii) received or receive Section 8 assistance, or (iii) applied or will apply for public housing or Section 8 assistance pursuant to a program administered by the Housing Authority of the City of Dallas."

in a predominantly white area (the "Construction Sites" or the "Sites") and announced its plan to build public housing on both sites. The Respondents, a group of homeowners living nearby (the "Homeowners"), challenged the Remedial Order and sought injunctive relief to prevent the construction of public housing in their neighborhood. The district court rejected the Homeowners' claim that the Remedial Order discriminated against them on the basis of their race and denied all relief to the Homeowners. The Homeowners appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit in case 97-11083. On March 16, 1999, the Fifth Circuit reversed the district court and remanded with instructions to eliminate the "predominantly white" requirement from the Remedial Order. The Circuit Court did not, however, enjoin the construction of public housing on the Sites; the court instead held that its opinion does not preclude the construction of public housing on the Sites, provided the Sites are selected by means of non-racial criteria. The Fifth Circuit's opinion is styled *Walker, et al. v. City of Mesquite, et al.*, 169 F.3d 973 (5th Cir. 1999) and is attached at Appendix C.

On remand, the Homeowners applied for attorney's fees under 42 U.S.C. §1988. The district court denied the application, finding that the Homeowners were not prevailing parties, that special circumstances made a fee award unjust, and that the Homeowners failed to substantiate their fee request or exercise proper billing judgment. The district court's order denying the Homeowners' request for attorney's fees is attached at Appendix B. The Homeowners appealed that ruling.

On November 19, 2002, in case 01-11380, styled *Walker, et al. v. City of Mesquite, et al.*, 313 F.3d 246 (5th Cir. 2002), the Fifth Circuit issued its opinion and entered

judgment that (1) the Homeowners are a prevailing party entitled to recover their attorney's fees under 42 U.S.C. §1988 and (2) no special circumstances existed that would mitigate against recovery of fees by the Homeowners. The November 19, 2002, opinion is attached at Appendix A.

JURISDICTION

The Court has jurisdiction over the Fifth Circuit's Judgment addressing a federal statute (42 U.S.C. §1988) pursuant to 28 U.S.C. §1254(1). Judgment was entered on November 19, 2002. This Petition is being timely filed within 90 days of Judgment, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.

The Court should grant this Petition for Writ of Certiorari pursuant to Supreme Court Rule 10 because (1) the Fifth Circuit's standard for determining special circumstances under 42 U.S.C. §1988 conflicts with the standards applied by other circuit courts, (2) the Fifth Circuit's punishment of a litigant for complying with a court order so far departs from the accepted and usual course of judicial proceedings to require review, and (3) the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

STATUTORY PROVISIONS AT ISSUE

42 U.S.C. §1988(b) provides:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985,

> and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. §2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

This is a civil rights institutional reform case brought by African-Americans who complained of racial discrimination in the administration of DHA's public housing programs. The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. §1331. The district court found the Housing Authority liable and, among other things, ordered the Housing Authority to buy or build public housing in "predominantly white areas." Appendix D.

Complying with the district court's order, DHA bought two unimproved tracts in a predominantly white area, and announced plans to build a small apartment complex on each tract.

The Respondents, a group of homeowners living nearby, challenged the Remedial Order and sought injunctive relief to prevent the construction of public housing in their neighborhood.

The district court rejected the Homeowners' claim that the Remedial Order discriminated against them on the basis of their race (predominantly white), and denied relief to the Homeowners. The Homeowners appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit in case 97-11083.

On March 16, 1999, the Fifth Circuit held that the application of the "predominantly white" requirement deprived the Homeowners of their Constitutionally protected right to equal protection; the Circuit Court reversed the district court and remanded with instructions to eliminate the "predominantly white" requirement from the Remedial Order. The Circuit Court did not, however, enjoin the construction of public housing on the Sites; the court instead held that its opinion does not preclude the construction of public housing on the Sites, provided the Sites are selected by means of non-racial criteria. Appendix C.

The Homeowners then sought attorney's fees relating to their action for injunctive relief and their appeal of the district court's order denying injunctive relief. After an evidentiary hearing, the magistrate judge recommended denial of the motion for attorney's fees, and the district judge adopted the findings, conclusions, and recommendations of the magistrate judge. Appendix B. The Homeowners appealed from the district judge's order denying attorney's fees.

On appeal, the Housing Authority argued that the Homeowners were not entitled to attorney's fees because (1) the Homeowners did not get the injunctive relief they sued for and therefore were not a prevailing party within the meaning of §1988; (2) attorney's fees should not be imposed on DHA when it did nothing more than obey the district court's order; and (3) the Homeowners failed to prove the amount of their fees.

The Court of Appeals reversed, finding that (1) although the Homeowners failed to get the injunctive relief they sued for, they were a prevailing party because they forced the district court to revise the Remedial Order; and (2) the fact that DHA was forced to apply the "predominantly white" requirement at the risk of imprisonment and fine was not a "special circumstance" that would render the imposition of attorney's fees unjust, because (i) "a state actor's good faith compliance with an official or legal requirement that is unconstitutional is not a special circumstance that justifies the denial of attorney's fees"; (ii) "DHA did not litigate the unconstitutional terms of the Remedial Order; it instead chose not to contest the Walker plaintiffs' motion for summary judgment"; and (iii) "it seems particularly inappropriate to deny the Homeowners attorney's fees because the DHA acquiesced to a remedy that infringed upon the Homeowners' rights." *Walker, et al. v. City of Mesquite, et al.*, 313 F.3d 246, 251 (5th Cir. 2002); Appendix A at App. 5-8.

REASONS FOR GRANTING THE PETITION

The Court should grant review to clearly define "special circumstances" within the meaning of 42 U.S.C. §1988 and thereby (i) carry out the legislative intent to establish uniformity in the enforcement of the civil rights laws and (ii) avoid the adverse unintended consequences of a rule that encourages civil rights defendants to oppose remedial relief and defy court orders. The Court further should grant review to clarify this Court's standards for determining "prevailing party" status within the meaning of 42 U.S.C. §1988.

I. The Court should grant review to clearly define "special circumstances" within the meaning of 42 U.S.C. §1988 and thereby (i) carry out the legislative intent to establish uniformity in the enforcement of the civil rights laws and (ii) avoid the adverse unintended consequences of a rule that encourages civil rights defendants to oppose remedial relief and defy court orders.

A. The statutory provision at issue.

Title 42 of the United States Code, Section 1988 provides, in pertinent part, that:

> In any action or proceeding to enforce a provision of [section] . . . 1983 . . . , the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .

B. The Congressional intent to adopt a "special circumstances" rule.

Congress, in enacting Section 1988, rejected proposals that would have required an award of attorney's fees to every prevailing party and instead expressed its intention

that Section 1988 be applied consistent with the rule, previously announced by this Court, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968), that a prevailing party "should ordinarily recover an attorney's fee *unless special circumstances would render such an award unjust.*" (emphasis added). S. REP. NO. 94-1011, 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912; *see also* H. REP. NO. 94-1558, 3 (1976).

C. The Congressional intent to apply the "special circumstances" rule uniformly.

Congress in enacting the Civil Rights Attorney's Fees Awards Act of 1976 intended to make the enforcement of the civil rights laws uniform throughout the United States:

> "The purpose of this amendment [the 1976 amendment to 42 U.S.C. §1988] is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, [95 S. Ct. 1612] (1975), and to *achieve consistency in our civil rights laws.*"

S. REP. NO. 94-1011, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5909 (emphasis added); H. REP. NO. 94-1558 at 1. Presumably, Congress intended that all aspects of the attorney's fee provision would be applied uniformly, including the *Piggie Park* special circumstances rule.

D. The lack of uniformity in applying the "special circumstances" rule.

In enacting Section 1988, Congress intended that a plaintiff, "if successful, should ordinarily recover an

attorney's fee *unless special circumstances would render such an award unjust.'"* S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5912, *citing Newman v. Piggie Park,* 390 U.S. at 402, 88 S. Ct. at 966.

In the 35 years since *Piggie Park*, several circuits have failed to establish any guidelines for the application of the special circumstances rule, and the remaining circuits vary widely in their application of the rule. Congress mandated that state actors should not be required to pay attorney's fees where the imposition of attorney's fee liability would be unjust. The courts have largely ignored the Congressional mandate, and there are but a handful of instances where any court has invoked the special circumstances rule to deny a request for attorney's fees.

The First Circuit Court of Appeals. The First Circuit has found that "special circumstances" exist to deny an award of fees where the fee application reflects "(1) no 'good faith' effort to exclude excessive, redundant, or otherwise unnecessary hours, (2) no reduction for time spent on unsuccessful claims, and (3) no allowance for the limited 'degree of success' achieved by the plaintiff." *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997).

The Second Circuit Court of Appeals. The Second Circuit employs a two-step test to determine whether "special circumstances" make it appropriate to deny attorney's fees. *Kerr v. Quinn*, 692 F.2d 875 (2d Cir. 1982).[2] The court

[2] The Second Circuit's test has been explicitly rejected by the Third, Seventh, and Tenth Circuits. *See Cunningham v. City of McKeesport*, 753 F.2d 262, 268 (3d Cir. 1985), *vacated and remanded on*

(Continued on following page)

initially examines whether the plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily retained. *Id.* at 877. If the plaintiff's case meets the first requirement of the two-step test, then the court may deny fees if, in light of all of the circumstances and the size of recovery, an award might work injustice. *Id.* at 877-88.

The Fifth Circuit Court of Appeals. Like most circuits, the Fifth Circuit has identified situations that do not qualify as "special circumstances." The Fifth Circuit has identified only one situation where "special circumstances" existed to deny fees: where the plaintiff's counsel submits an excessive fee request. *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557, 558-59 (5th Cir. 1998) (finding that a court may deny fees entirely when the request is so excessive it shocks the conscience of the court).

The Ninth Circuit Court of Appeals. The Ninth Circuit employs a two-part test to determine whether a case presents "special circumstances" that would justify the denial of an attorney's fee award.[3] The court first examines

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other grounds and reinstated, 807 F.2d 49 (3d Cir. 1987) ("the statute contains no contingent fee exception"); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982) (the Second Circuit test "had no place in the numerous attorney's fee decisions of this Court. More important, there is no indication whatsoever that it was in the mind of Congress when it enacted the Fees Awards Act."); *Cooper v. Singer*, 719 F.2d 1496, 1501-02 (10th Cir. 1983), *abrogated on other grounds, Venegas v. Mitchell*, 495 U.S. 82, 110 S. Ct. 1679 (1990) ("we decline to adopt the bright prospects [the Second Circuit's] rule").

[3] The First Circuit has explicitly rejected the Ninth Circuit's approach, stating: "The district court seems rather to have employed a

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whether allowing the recovery of attorney's fees would further the purposes of Section 1988. *Bauer v. Sampson*, 261 F.3d 775, 785-86 (9th Cir. 2001); *Seattle School Dist. No. 1 v. State of Washington*, 633 F.3d 1338, 1348 (9th Cir. 1980). The court will also examine whether the balance of equities would favor the denial of fees. *Id.*

Other Circuit Courts of Appeal. While the tests for the First, Second, and Ninth Circuits seem relatively clear, the remaining circuits give little or no direction as to what behavior or situation will constitute "special circumstances." We find no decision by the Third Circuit or Sixth Circuit where "special circumstances" were found to justify a denial of attorney's fees.

E. Giving effect to the intent of Congress.

The stated purposes of the Civil Rights Attorney's Fees Awards Act of 1976 were to enable private parties to bring meritorious civil rights suits and to "achieve consistency in our civil rights laws." S. REP. NO. 94-1011, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5909. The varying interpretations of the "special circumstances" rule among the circuits have resulted in an uneven application of Section 1988 and have frustrated the Congressional intent to "achieve consistency in our civil rights laws." The Court should grant review of this case in order to carry out the Congressional intent to make enforcement of the civil rights laws uniform throughout the United States.

'balancing of the equities' test not accepted in this circuit." *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997).

F. The unintended consequences of the Fifth Circuit's decision.

The Fifth Circuit's refusal to find "special circumstances" in this case was based on (1) the Housing Authority's failure to oppose the motion that resulted in an order requiring placement of public housing in "predominantly white areas," and (2) DHA's obedience to a court order that subsequently was held unconstitutional. As the court of appeals said in its opinion:

> We have repeatedly held that a state actor's good faith compliance with an official or legal requirement that is unconstitutional is not a special circumstance that justifies the denial of attorney's fees. . . . DHA did not litigate the unconstitutional terms of the Remedial Order; it instead chose not to contest the Walker plaintiffs' motion for summary judgment. . . . Given the DHA's ongoing involvement in this litigation, it seems particularly inappropriate to deny the Homeowners attorney's fees *because the DHA acquiesced* to a remedy that infringed upon the Homeowners' rights. . . .

Walker, 313 F.3d at 251; Appendix A at App. 7-8.

As the district court recognized, DHA faced a

> . . . Hobson's choice of either violating an order of a court, thereby avoiding the possibility of later filed claims, while at the same time exposing itself to contempt proceedings . . . or of obeying the order and exposing itself to being required to reimburse complaining homeowners for their attorneys' fees and expenses.

Appendix B at App. 17.

The Fifth Circuit reversed, holding, in effect, that Section 1988 allows a civil rights defendant to be penalized for obeying a court order. That decision has serious unintended public policy implications that will adversely affect the judicial system.

This Court has made clear that a party must comply with a court order even if he might have proper grounds to object to the order or if the order is subject to substantial constitutional question. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386, 100 S. Ct. 1194, 1201 (1980); *Walker v. City of Birmingham*, 388 U.S. 307, 314-15, 87 S. Ct. 1824, 1828-29 (1967); *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S. Ct. 677, 695-96 (1947). Indeed, "[v]iolations of [a court] order are punishable as criminal contempt even though the order is set aside on appeal." *United Mine Workers*, 330 U.S. at 294, 67 S. Ct. at 696. The Housing Authority therefore did not enjoy the option of disregarding the Remedial Order.

As a result of the Fifth Circuit's decision in this case, a civil rights defendant, in order to avail himself of the Congressionally-mandated "special circumstances" rule and thereby avoid attorney's fee liability, must oppose every proposed remedial measure in the trial court and, as each remedial order is entered, must disobey and then appeal the entry of that order.

The unintended consequences of the Fifth Circuit's decision are contrary to public policy in at least two respects. First, because a failure to oppose a request for remedial relief is a ground for imposing attorney's fee liability, the Fifth Circuit's decision encourages civil rights defendants to oppose every motion for remedial relief, even

motions the defendant believes to be meritorious: such a rule would result in an unnecessary waste of judicial resources, encourage unethical conduct,[4] and act as a disincentive for civil rights defendants to enter into consent decrees. Second, because the Fifth Circuit would impose liability for a civil rights defendant's obedience to a remedial order, its decision encourages civil rights defendants to disobey every remedial order entered in the district court and exhaust every avenue of appeal in order to assure themselves that they are not complying with an unconstitutional order.

The practical result would be that in every civil rights case in which the district court enters a remedial order, the defendant would file a motion for reconsideration in the trial court. If the district court denies the motion for reconsideration, the defendant would then appeal the district court's order to the court of appeals, for as we learn from the Fifth Circuit's decision in this case, civil rights defendants cannot safely rely on constitutional adjudications in the district courts; because the decisions of the courts of appeal are subject to reversal in this Court, the defendant would then apply to this Court for a final

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[4] In Texas, if not in every jurisdiction, lawyers are prohibited from opposing motions unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous. Texas Disciplinary Rules of Professional Conduct, Rule 3.01; Local Rules of the Northern District of Texas, LR 83.8. *See also Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284, 286 (N.D. Tex. 1988). Requiring civil rights defendants to oppose every motion for remedial relief, regardless of their lawyer's belief in the merits of a particular motion and simply to avoid the imposition of attorney's fees on the client, would subject the lawyer to disciplinary action by the State Bar of Texas and to disbarment by the Northern District of Texas. That unintended consequence would effectively deprive civil rights defendants of their right to counsel.

unappealable decision that the district court's remedial order is constitutional. Only then could the defendant hope to avoid liability for attorney's fees.

As Mr. Justice Kennedy noted in his dissent in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 406, 120 S. Ct. 897, 914 (2000):

> The justifications for the case system and *stare decisis* must rest upon the Court's capacity, and responsibility, to acknowledge its missteps. It is our duty to face up to adverse, unintended consequences flowing from our own prior decisions.

It must be equally true that, in the interest of preserving the case system and *stare decisis*, this Court must correct the missteps of the courts of appeal and deal with the unintended consequences of their decisions.

Congress did not intend to impose attorney's fee liability on every unsuccessful civil rights defendant and instructed the courts not to impose liability where special circumstances would render an award unjust. It is unjust to force a public agency to pay attorney's fees for its good faith obedience to a court order. The Court should correct the Fifth Circuit's error and avert the unintended adverse consequences of that court's decision.

II. The Court should grant review to clarify the standards for determining "prevailing party" status within the meaning of 42 U.S.C. §1988.

This Court consistently has held that, in order to attain prevailing party status within the meaning of 42 U.S.C. §1988, a civil rights plaintiff must obtain an enforceable judgment granting him meaningful relief. As the

Court said in *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566 (1992):

> To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

Farrar, 506 U.S. at 112-13, 113 S. Ct. at 573-74 (1992) (citations omitted). In *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835 (2001), this Court rejected the "catalyst theory" of attorney's fee entitlement because only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604, 121 S. Ct. at 1840.

The Homeowners sued for an injunction "enjoining and restraining DHA from acquiring the Sites or, in the alternative, from constructing public housing on the Sites." On appeal, they characterized their case as a "lawsuit seeking to enjoin construction of public housing at the Sites."

The Housing Authority argued before the Fifth Circuit that the Homeowners were not a prevailing party within the meaning of 42 U.S.C. §1988 because they sued to enjoin the construction of public housing in their

neighborhood and failed to obtain that relief, and further argued that the district court could still approve the site and order the Housing Authority to build on that site. The Fifth Circuit disagreed and held that the Homeowners were a prevailing party within the meaning of 42 U.S.C. §1988 because, although the Homeowners failed to enjoin the construction of public housing in their neighborhood, they "achieved exactly the outcome they desired," *Walker*, 313 F.3d at 250; Appendix A at App. 5-6, by forcing the revision of the Remedial Order to eliminate the "predominantly white" site selection criterion.

As the dissenting judge wrote:

> From the very beginning of their involvement in this litigation until now, the real objective of the Homeowners has been to prevent the Dallas Housing Authority from constructing new public housing units on land adjacent to the their neighborhoods. They have not achieved that objective. . . . In my view, this is an example of what the Supreme Court meant when it stated that "Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status." [citations omitted] In this case, the Homeowners have not "prevailed", i.e., attained their litigation objectives, in any material or realistic way.

Walker, 313 F.3d at 252; Appendix A at App. 11.

The Homeowners' only purpose, whether through an injunction or revision of the Remedial Order, was to prevent the intrusion of public housing into their neighborhood. To date, the Homeowners have failed in that attempt.

As the dissenting judge said, the Homeowners have not "attained their litigation objectives in any material or realistic way," and this Court should reverse the decision of the Fifth Circuit declaring the Homeowners a prevailing party.

CONCLUSION

The Fifth Circuit Court of Appeals has held that The Housing Authority of the City of Dallas must pay attorney's fees because the Housing Authority obeyed a court order. The court analogized the Housing Authority's judicially-compelled conduct to the voluntary conduct of state actors who elected to enforce state laws without the benefit of prior adjudications. The Circuit Court, having made that analogy, reasoned that it was particularly appropriate to punish the Housing Authority for its obedience because the Housing Authority neither opposed the entry of the order nor resisted the order once it was entered. The import of the Fifth Circuit's decision is that civil rights defendants cannot rely on decisions made by the district courts, must oppose all proposed remedial measures, and must appeal every remedial order.

Imposing sanctions for failure to oppose a proposed remedy would lead civil rights defendants to oppose every proposed remedy. Imposing sanctions for obeying court orders would encourage defendants to disobey remedial orders and to pursue endless appeals in order to avoid liability for attorney's fees.

The imposition of liability for consenting to remedial measures and for obedience to remedial orders is contrary to public policy because it would undermine confidence in

the ability of the district courts to adjudicate the matters before them, would unnecessarily increase the workload of the district courts and the appellate courts, and would discourage the voluntary settlement of complex civil rights institutional reform cases.

The Court should grant the Petition and issue a Writ of Certiorari in order to effectuate the intent of Congress in uniform application of the civil rights laws and to avert the adverse consequences of the Fifth Circuit's decision.

Respectfully submitted,

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APPENDIX A

313 F.3d 246

Debra WALKER; et al., Plaintiffs,

Debra Walker; Jeanette Washington; Hazel Williams; Zelma Lang; Renita Brown; Lillie Thompson, Plaintiffs-Appellees,

Tracey Smith, Intervenor, Plaintiff-Appellee,

v.

CITY OF MESQUITE, TX; et al., Defendants,

v.

Highlands of McKamy IV and V Community Improvement Association; Ginger Lee; Preston Highlands Homeowners' Association, Inc.; David Beer, Appellants.

Highlands of McKamy IV and V Community Improvement Association; Ginger Lee; Preston Highlands Homeowners' Association, Inc.; David Beer, Plaintiffs-Appellants,

v.

The Housing Authority of the City of Dallas, Defendant-Appellee.

No. 01-11380.

United States Court of Appeals, Fifth Circuit.

Nov. 19, 2002.

Michael M. Daniel, Dallas, TX, for Plaintiffs-Appellees and Smith.

Michael P. Lynn, Eric Wolf Pinker, John Thomas Cox, III (argued), Russell James DePalma, Lynn, Tillotson & Pinker, Dallas, TX, for Appellants.

Joseph G. Werner (argued), Debra Janece McComas, Aimee Michelle Minick, Haynes & Boone, Dallas, TX, for Housing Authority of City of Dallas.

Appeal from the United States District Court for the Northern District of Texas.

Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH*, District Judge.

EMILIO M. GARZA, Circuit Judge:

This case arises from ongoing litigation between a class of plaintiffs (the "Walker plaintiffs") and the Dallas Housing Authority (DHA), the United States Department of Housing and Urban Development (HUD), and the City of Dallas (collectively, "the defendants"). In the primary litigation, the defendants were found liable for unconstitutional racial discrimination and segregation in Dallas's public housing programs. The result was a remedial order from the district court that, in relevant part, ordered DHA to construct or acquire public housing projects in "predominantly white" neighborhoods.

Two homeowners and their homeowners' associations (collectively, the "Homeowners") then sued for declaratory and injunctive relief to prevent construction of these new projects adjacent to their neighborhoods. The Homeowners

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* District Judge of the Western District of Texas, sitting by designation.

challenged the remedial order as unconstitutional. In a separate action, the Walker plaintiffs sought declaratory relief that the remedial order was constitutional. The district court found against the Homeowners and for the Walker plaintiffs in the two actions, respectively. The Homeowners appealed, and we partially vacated the remedial order, reversed the declaratory judgment, and remanded for revision of the order. A more thorough recitation of the facts and issues of this complicated case can be found in our decision, *Walker v. City of Mesquite,* 169 F.3d 973 (5th Cir.1999).

Upon remand, the district court modified the remedial order to comply with our instructions. The Homeowners next sought attorney's fees in excess of a quarter of a million dollars from the DHA under 42 U.S.C. § 1988. The district court denied fees, holding that (1) the Homeowners were not a "prevailing party" within the meaning of § 1988; (2) special circumstances existed which made it unjust to impose fees upon the DHA; and (3) the Homeowners' fee request had not been appropriately substantiated. *See Walker v. HUD,* No. 3-85-CV-1210-R, 3-96-CV-1866-R, 2001 WL 1148109 (N.D.Tex. Sept.18, 2001). The propriety of § 1988 attorney's fees for the Homeowners is the primary issue in this appeal.

Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of [§ 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." A litigant is not eligible for attorney's fees unless it is a "prevailing party." *Hewitt v. Helms,* 482 U.S. 755, 759, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). In *Hewitt,* the Supreme Court held that, at a minimum, a plaintiff must receive "some relief on the merits of his claim" in

order to prevail. *Id.* at 760, 107 S.Ct. 2672. *Texas State Teachers Ass'n v. Garland Independent School District,* 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), reaffirmed the floor set in *Hewitt* and noted that the plaintiff must be able to point to "a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 791-92, 107 S.Ct. 2672. In fact, *Texas State Teachers* characterized the "touchstone" of the prevailing party inquiry as whether there was a "material alteration of the legal relationship of the parties." *Id.* at 792-93, 109 S.Ct. 1486.

Three years later, the Court returned to this issue in *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). *Farrar* provided one of the clearest formulations of the prevailing party jurisprudence. To qualify as a prevailing party, the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement. *Id.* at 111-12, 113 S.Ct. 566. Most recently, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the Court reaffirmed that both judgments on the merits and settlement agreements enforced through consent decrees were sufficient to create a prevailing party. *Id.* at 604, 121 S.Ct. 1835. Again, the Court stated that the awarded relief for which fees were sought must materially alter the "legal relationship of the parties." *Id.* (citing *Texas State Teachers,* 489 U.S. at 792-93, 109 S.Ct. 1486).

In this case, the Homeowners sought declaratory relief, alleging the remedial order was unconstitutional because it included race-based distinctions and was not narrowly tailored. They also sought a temporary restraining order, a preliminary injunction, and a permanent injunction to prevent the DHA from purchasing and/or constructing public housing on the disputed sites. The district court denied the Homeowners the relief they sought and, in response to the Walker plaintiffs' suit, declared the remedial order constitutional. On appeal, we partially vacated the district court's remedial order, reversed the declaratory judgment, and stayed the construction of the housing projects until the district court revised the order. Our opinion also included a detailed discussion of how the remedial order should be reformulated. Specifically, we held that the race-based portion of the order was unconstitutional because "there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas." *Walker,* 169 F.3d at 987. Upon remand, the Walker plaintiffs proposed detailed modifications to the remedial order, and the district court ultimately vacated the provisions of the order that contained the "predominantly white" requirement. In short, the Homeowners achieved exactly the outcome they desired. Thus, the district court erred when it held that the Homeowners were not a prevailing party.

The DHA argues that the Homeowners cannot be a prevailing party because our holding was not "judicial relief" for the purposes of § 1988. We find this argument to be without merit. Although the permanent injunction sought by the Homeowners was never granted, this court held, as a matter of law, that the remedial order was unconstitutional for precisely the reasons argued by the

Homeowners in their request for declaratory relief. On its face, our ruling entitled the Homeowners to relief. Thus, the district court's ultimate vacation of the offending provisions of the order is the functional equivalent of an enforceable judgment for the Homeowners and against the DHA.[1] As to the second and third requirements of the

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[1] The Homeowners did not simply achieve a favorable statement of the law or a temporary stay, as suggested by the DHA in its brief. This court's finding that the remedial order was unconstitutional, and the district court's later modification of that order to comply with our ruling is distinguishable from the cases cited by the DHA. In *Hewitt,* the prisoner plaintiff had only obtained an "interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim." 482 U.S. at 760, 107 S.Ct. 2672. Upon remand, the district court again granted summary judgment for the defendants because they were found to have qualified immunity. The bureau of corrections ultimately revised its regulations to respond to some of the constitutional issues raised by the prisoner, but the Supreme Court held that the plaintiff's failure to achieve either an award of damages or the injunctive and declaratory relief he sought did not render him a prevailing party. *Id.; see also Buckhannon,* 532 U.S. at 605-10, 121 S.Ct. 1835 (rejecting the "catalyst theory" that a suit which ultimately results in the amendment of a law or regulation through non-judicial channels is enough to render a party "prevailing" within the meaning of § 1988). The DHA next cites *Buckhannon* for the proposition that a party has not prevailed if it only secures the reversal of a directed verdict or a pronouncement that the defendant violated the Constitution *unaccompanied* by judicial relief. 532 U.S. at 605-06, 121 S.Ct. 1835. In fact, *Buckhannon* does indicate that fees are only appropriate when the plaintiff has received a judgment on the merits or a court-ordered consent decree. *Id.* As explained above, however, the Homeowners not only secured the reversal of the declaratory judgment but also achieved a partial vacation of the remedial order and the ultimate revision of that order in the district court. Thus, our pronouncement on the constitutionality of the order was accompanied by the district court's "*judicial* relief" modifying the order. *See Buckhannon,* 532 U.S. at 606, 121 S.Ct. 1835 (citation omitted) (emphasis in *Buckhannon*); *see also Hanrahan v. Hampton,* 446 U.S. 754, 757, 100 S.Ct. 1987, 64 L.Ed.2d

(Continued on following page)

prevailing party test, there can be no doubt that the Homeowners' suit both materially altered the legal relationship between the DHA and the Homeowners and directly benefitted the Homeowners at the time of the judgment. The Homeowners suit was not only a "substantial factor" in achieving reformation of the unconstitutional order, it was arguably the only factor. *See Foreman v. Dallas County,* 193 F.3d 314, 321(5th Cir.1999) (citation omitted).

Notwithstanding the Homeowners' status as a prevailing party, attorney's fees should not be awarded if "special circumstances would render such an award unjust." *Hensley v. Eckerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (citation omitted); *Newman v. Piggie Park Enters.,* 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). The district court adopted the magistrate judge's conclusions that the DHA should not be liable for fees because it was faced with the unattractive choice of either violating the district court's remedial order or obeying the order and exposing itself to potential liability for the fees and expenses of the Homeowners. *Walker v. HUD,* 2001 WL 1148109, at *2-3. We have repeatedly held that a state actor's good faith compliance with an official or legal requirement that is unconstitutional is not a special circumstance that justifies the denial of attorney's fees. *See Espino v. Besteiro,* 708 F.2d 1002, 1005-06 (5th Cir. 1983); *Riddell v. Nat'l Democratic Party,* 624 F.2d 539, 545-46 (5th Cir.1980); *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir.1979). Additionally, the DHA did not

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670 (1980) (*per curiam*) (holding that a party can prevail on the merits of his claims in the trial court or on appeal).

litigate the unconstitutional terms of the remedial order; it instead chose not to contest the Walker plaintiffs' motion for summary judgment. *See Walker,* 169 F.3d at 977. Given the DHA's ongoing involvement in this litigation, it seems particularly inappropriate to deny the Homeowners attorney's fees because the DHA acquiesced to a remedy that infringed upon the Homeowners' rights.[2] Thus, the special circumstances cited by the district court in this case are insufficient to justify the denial of an award of attorney's fees.

Finally, the district court found that the Homeowners' fee request should be denied because they failed to substantiate their request under well-established principles. Generally, the magistrate judge found, and the district court agreed, that the Homeowners' attorneys did not exercise "billing judgment" because they did not document both the hours charged and the hours written off and they included non-legal hours in their submissions, including time billed for drafting press releases and preparing for a media interview. *Walker v. HUD,* 2001 WL 1148109, at *3-4. In addition, the Homeowners were found to have requested fees for time spent on issues that were not pursued and time spent exclusively on responding to motions

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[2] The district court also held that, if the DHA was liable under § 1988, the fees recoverable by the Homeowners should be reduced *pro rata* because the Walker plaintiffs were also responsible for the remedial order. *Walker v. HUD,* 2001 WL 1148109, at *3. We note that the Walker plaintiffs cannot be jointly and severally liable for attorney's fees with the DHA because they are not state actors under § 1983 and because the Homeowners did not seek any relief from the Walker plaintiffs.

and issues raised by the Walker plaintiffs, and not by the DHA.

The district court is correct that "[t]he plaintiffs are charged with the burden of showing the reasonableness of the hours they bill and, accordingly, are charged with proving that they exercised billing judgment." *Walker v. HUD,* 99 F.3d 761, 770 (5th Cir.1996) (dealing with an earlier stage of this same litigation that related to the Walker plaintiffs' request for § 1988 fees from the defendants). If there is no evidence of billing judgment, however, then the proper remedy is not a denial of fees, but a reduction of "the hours awarded by a percentage intended to substitute for the exercise of billing judgment." *Id.* Likewise, the Homeowners are not entitled to fees for issues on which they did not prevail, and they cannot have prevailed on issues they did not pursue. *Id.* at 769.

Although the district court found the Homeowners' marshaling of evidence "shoddy," it also noted that resources were "too scarce" to warrant the amount of time it would take to determine the appropriate fee award. As we held in *League of United Latin American Citizens # 4552 (LULAC) v. Roscoe Independent School District,* 119 F.3d 1228 (5th Cir.1997), "mere recitation that there is insufficient documentation cannot insulate" the district court's analysis from our review. *Id.* at 1233. The bills submitted by the Homeowners include the date of each hour spent and the time spent to the tenth of an hour.[3] In addition, a

[3] At this point, we pause to emphasize that the bills presented by the Homeowners are in fact the same bills the Homeowners reviewed and paid during the litigation.

majority of the entries include a "short but thorough description of the services rendered" – thus, these submissions appear to meet the threshold standard we set in *LULAC*. *Id.* Of course, not every entry is equally specific, and the district court has broad discretion to exclude or reduce the entries that are vague.[4] *Id.* We also ruled in *LULAC* that the district court must eliminate excessive or duplicative time. *Id.* at 1232. On remand, the district court should analyze the evidence submitted by the Homeowners and determine an appropriate fee award, keeping in mind the criteria set out in *LULAC*. As a final matter, we note that the Homeowners are also entitled to reasonable attorney's fees for the time devoted to this appeal. *Id.* at 1236. Whether to allow the Homeowners to amend their prior fee application to comply with *LULAC* is left to the discretion of the district court.

For the forgoing reasons, we REVERSE the district court's findings that the Homeowners were not a prevailing party within the meaning of § 1988 and that special circumstances existed that justified the denial of attorney's fees, and we REMAND for a determination of attorney's fees consistent with this opinion.

HUDSPETH, District Judge, dissenting:

Because I believe that the distinguished district judge did not abuse his discretion in finding that the Appellants

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[4] For example, at least one invoice includes such summary descriptions as "research regarding" and "research legal issues." These general descriptions are almost identical to the entry we found vague in *LULAC*. 119 F.3d at 1233. In that case, we held that such vague entries could be reduced or eliminated by the district court. *Id.*

were not "prevailing parties" entitled to an award of attorney's fees under § 1988, I respectfully dissent.

From the very beginning of their involvement in this litigation until now, the real objective of the Homeowners has been to prevent the Dallas Housing Authority from constructing new public housing units on land adjacent to the their neighborhoods. They have not achieved that objective. When this Court decided the previous appeal in 1999, it did stay construction at the sites adjacent to the Homeowners' neighborhoods pending further proceedings in the district court. *Walker v. City of Mesquite, Texas,* 169 F.3d at 988. However, that stay has long since expired, and neither the district court nor this Court has enjoined construction of public housing units on those specific sites. Indeed, the Dallas Housing Authority is still considering building new public housing units on those sites, basing the decision to build there upon criteria which the Authority asserts are race-neutral. In my view, this is an example of what the Supreme Court meant when it stated that "Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status." *Farrar v. Hobby,* 506 U.S. at 112, 113 S.Ct. 566; *Hewitt v. Helms,* 482 U.S. at 762, 107 S.Ct. 2672. In this case, the Homeowners have not "prevailed", i.e., attained their litigation objectives, in any material or realistic way. Therefore, I would hold that the district court did not abuse its discretion in denying the Homeowners' application for attorney's fees, and would affirm the decision below.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL	)	
	)	3-85-CV-1210-R
VS.	)	(Consolidated with
	)	3-96-CV-1866-R)
UNITED STATES	)	
DEPARTMENT OF HOUSING	)	
AND URBAN DEVELOPMENT,	)	
ET AL	)	

ORDER

(Filed Sep. 18, 2001)

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED AND ENTERED this 18 day of Sept., 2001.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL	)	
V.	)	3-85-CV-1210-R
	)	(Consolidated with
UNITED STATES	)	3-96-CV-1866-R)
DEPARTMENT OF HOUSING	)	
AND URBAN DEVELOPMENT,	)	
ET AL	)	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 27, 2001)

Pursuant to the District Court's order of reference filed on March 30, 2001, on August 8, 2001, came on to be heard Homeowner Plaintiffs' Motion for Attorneys' Fees and Costs filed on June 18, 1999, and having considered the relevant pleadings and exhibits and the testimony of Eric W Pinker, the magistrate judge finds and recommends as follows:

In their motion the Movants seek an award of in excess of one quarter of a million dollars from the Dallas Housing Authority (DHA) pursuant to 42 U.S.C §1988

Issue is joined on several issues which are addressed seriatim:

1. Are Movants "prevailing parties" as that term has been interpreted by the courts in applying §1988?

The Movants became parties to this 15 year old controversy with the filing of their original complaint on

July 3, 1996, in No. 3-96-CV-1866-R, which was subsequently consolidated with the present action on July 12, 1996. In April 1996 the District Court had entered its remedial order which in pertinent part ordered DHA to develop all new public housing units in predominantly white areas until there were as many units in predominantly white areas as there were in minority areas. *Walker v. City of Mesquite, Texas,* 169 F.3d 973, 977 (5th Cir. 1999). In carrying out its obligations imposed by the said remedial order, DHA selected sites adjacent to Movants' neighborhoods on which to build a portion of its new public housing units.

Movants sought an order from the District Court enjoining the construction of the public housing in their neighborhoods. Following a three day hearing before the District Court in late October 1996, the District Court denied the Homeowners' request for injunctive relief on September 18, 1997. *See* also Transcript, Docket Item No. 1652. The Homeowners appealed and sought *inter alia* a stay of the District Court's remedial order, which was granted by the Fifth Circuit.

On March 16, 1999, the Fifth Circuit vacated the remedial order and remanded the case to the District Court for further proceedings with the further proviso that the stay previously granted would remain in effect pending entry of a revised remedial order. *See Walker v. City of Mesquite, supra,* 169 F.3d at 988. The Fifth Circuit's opinion addressed in detail the issue of whether "race conscious" site selection was appropriate. *Id.* at pages 981-987. In addressing whether the Homeowners are "prevailing parties" it is important to note that the Court did not foreclose a remedial order permitting or requiring DHA to build public housing on the subject sites, but rather left

the issue open for the District Court to decide after a further hearing.

Although the Homeowners have achieved a preservation of the status quo *ante,* it does not constitute a judgment in their favor, a necessary prerequisite to establishing a party's entitlement to "fee shifting" as a "prevailing party." *See Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, Inc.,* ___ U.S. ___, 121 S.Ct. 1835, 1839 (2001). Moreover, were DHA to choose not to build public housing on the site and to sell the property to a third party, *Buckhannon* makes clear that recovery of attorneys' fees under §1988 would be foreclosed.[1]

The Homeowner Plaintiffs are not "prevailing parties". Therefore their motion for attorneys' fees should be denied.

2. Should an award of attorneys' fees be made?

Although the magistrate judge is of the opinion that the first issue is dispositive of the motion, I will address this issue. While §1988(b) expressly provides that attorney's fees *may* be awarded in the court's discretion, as

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[1] In *Buckhannon* the Supreme Court squarely rejected the "catalyst theory" as a basis for finding that a party was a "prevailing party" within the purview of §1988. The petitioners in *Buckhannon* apparently argued strenuously that a failure to accept the "catalyst theory" would enable a party, by its own conduct, to foreclose an opponent's ability to obtain attorney fees. This argument notwithstanding, the court held that the "catalyst theory" was not authorized under the clear legislative language and the Supreme Court's prior opinions. *Id.* at 1842-43. *See also Johnson v. Rodriguez,* ___ F.3d ___, 2001 WL 845180 (5th Cir.2001).

interpreted by the case law, a court abuses its discretion in refusing to award a prevailing plaintiff attorneys' fees and expenses absent "special circumstances". *E.g. see Ellwest Stereo Theatre v. Jackson,* 653 F.2d 954 (5th Cir. Unit B 1981).

It is well established that a "losing defendant" cannot defeat a request for attorneys' fees based upon the defendant's "good faith" belief that it was doing the right thing or that it believed that its conduct was lawful. Even under circumstances where a governmental entity's conduct is consonant with existing state law or when a legislative body has withheld funds from such a defendant to perform services which a civil action seeks to obtain, courts have held that such do not constitute "special circumstances" foreclosing a fee award.

However, DHA's situation is somewhat unique in that it was under a court order to do that which it did, i.e. to construct new public housing units in predominantly white areas. The fact that DHA purchased land for such construction adjacent to the Homeowners' neighborhoods appears to have been mere happenstance and driven only by economics and the availability of vacant land. DHA's involvement in this action is briefly recounted in *Walker, supra,* at 169 F.3d 976-77. The order which mandated DHA's conduct was entered only after DHA was found to have repeatedly violated a previously entered consent decree, and after the District Court held a trial in September 1994 with respect to remedies.

Unlike those cases in which "good faith" in various contexts was insufficient to constitute a "special circumstance," DHA was under a specific federal court order to act in the manner in which it did in selecting sites in

predominantly white areas of metropolitan Dallas. In such a situation DHA should not be placed to the Hobson's choice of *either* violating an order of a court, thereby avoiding the possibility of later filed claims, while at the same time exposing itself to contempt proceedings (particularly in light of its past history) *or* of obeying the order and exposing itself to being required to reimburse complaining homeowners for their attorneys' fees and expenses. Accordingly this warrants a finding of "special circumstances" justifying denial of the Homeowner Plaintiffs' motion.

Further, although it is understandable why Movants do not seek recovery of any of their fees and expenses from the indigent Walker Plaintiffs, it appears to the magistrate judge to be inequitable to permit them to recover all of their recoverable fees and expenses from DHA.[2] I would find this to be a special circumstance – which in the event that DHA is determined to be liable under §1988 – warranting an equitable reduction of the "lodestar" to more appropriately reflect a *pro rata* assessment of the fees and expenses which should be reimbursed by DHA.

Finally, the magistrate judge is of the opinion that the Homeowner Plaintiffs' fee request should be denied or substantially reduced as a result of their failure to substantiate their request under well-established principles. *See* Part 3, *infra*.

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[2] The magistrate judge is aware that non-prevailing parties in this case *may* be held jointly and severally liable for attorneys' fees. *See Walker v. U.S. Department of Housing and Urban Development*, 99 F.3d 761, 772-73 (5th Cir.1996).

3. How much are the Homeowner Plaintiffs entitled to receive?

Although for the reasons stated in Part 1, *supra,* the Movants have failed to establish that they are "prevailing parties", in both the court's notice letter to counsel and at the hearing on August 8, 2001, the magistrate judge advised counsel that he would include a recommendation as to the amount of attorneys' fees and expense Movants would be entitled to receive if it were determined that they were "prevailing parties." For the reasons set out below, the magistrate judge *sua sponte* finds that such a calculation should be deferred.

In *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933 (1983), the principal case dealing with the assessment of attorneys' fees, the Supreme Court set out the requirements to be met by a party seeking attorney's fees under §1988 and the standards by which a court is to determine the amount to be assessed. The Court observed that "A request for attorney's fees should not result in a second major litigation. *Ideally,* of course, litigants will settle the amount of a fee." (Emphasis added). *Id.* at 438, 103 S.Ct. 1941. This overly optimistic prediction may derive from the fact that the Supreme Court is two-tiers above the district courts, which in the first instance must make such determinations.

Under the best of circumstances assessing the amount of attorneys' fees in Movants' case would be a daunting task. For example, during the period covered by their request – May 10, 1995 through April 30, 1999 – over 55 pages of docket entries have been generated, albeit not all related to matters involving the homeowners. At the time the magistrate judge threw up his hands, as it were, I had

spent more than nine hours perusing the homeowners' billing statements sent by their attorneys, as well as reviewing six volumes of the court's records in an effort to discharge my judicial function. Frankly judicial resources are too scarce to warrant this amount of time to a matter which does not directly deal with the merits of a federal court action.

Given that Movants are seeking more than $250,000.00, the long established principles of *Hensley,* and the numerous reported opinions dealing with attorney fee issues, most particularly the Fifth Circuit's opinion in *Walker v. U.S. Department of Housing and Urban Development,* 99 F.3d 761 (5th Cir. 1996) – an attorney's fee opinion arising out of this *very* case, it is inconceivable that the Homeowner Plaintiffs would have the audacity to rely on such a shoddy marshaling of evidence to support their claim.[3]

As *Hensley* notes, "... the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. The applicant should exercise 'billing judgment' with respect to hours worked." *Id.* In *Walker, supra,* 99 F.3d at 769 and at n. 9, the Fifth Circuit noted that ideally both hours charged and hours written off should be provided. Here no hourly records reflecting hours expended, but not charged,

[3] Their evidence consists of the law firm's billing records, an affidavit of Thomas M. Melsheimer with respect to the hourly rates charged by the law firm's attorneys and paralegals (a non-issue in light of DHA's concession that the rates were customary and reasonable) and less than thirty minutes of testimony presented by Eric Pinker.

have been included. However, the billing records themselves demonstrate an absence of "billing judgment". The Movants did such a poor job of documenting their attorneys' time that they initially included time billed by one of their attorneys while engaging in drafting press releases and preparing for a media interview. These errant charges were not lost on DHA and in their reply Movants concede that these non-legal related hours cannot be recovered.

Another demonstrable instance of lack of 'billing judgment' appears in the law firm's invoice dated August 27, 1997, which includes over 26 hours of time devoted to research regarding mandamus proceedings. No mandamus action was ever instituted. As noted by the Fifth Circuit in *Walker, supra,* 99 F.3d at 769. "[Parties] cannot have prevailed on issues they did not pursue."

These are not the only instances of a lack of billing judgment reflected in Movants' documents which the magistrate judge has examined, but a more detailed cataloging of additional questionable non-reimbursable charges will await the time if and when it becomes appropriate to calculate their transferable fees and expenses.

A more grievous error appearing in their documentation – which at best constitutes gross negligence – is their attempt to recover from DHA fees charged by their attorneys for time devoted *exclusively* to responding to the Walker Plaintiffs' motions and discovery issues. Specifically they seek to recover for 39 hours of attorneys' time in researching and responding to the Walker Plaintiffs' motion for summary judgment filed on August 13, 1996. On September 28, 1996, the Walker Plaintiffs filed a motion to determine the sufficiency of Movants' response to a Rule 36 request. This dispute was ultimately

addressed by the magistrate judge in an order filed on October 21, 1996. Movants did not prevail on their discovery posture, but more to the point there is no basis for their attempt to recover for more than 75 hours of time beginning on August 14, 1996, with respect to discovery in which DHA was not even involved.[4] The foregoing examples include over 100 hours of attorneys' time on matters which did not involve DHA at all and are clearly not recoverable from DHA.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court find that the Homeowner Plaintiffs are not prevailing parties. In the alternative, it is recommended that the District Court find that "special circumstances" exist which warrant denying the Homeowner Plaintiffs' motion for attorneys' fees and expenses.

Further, in the event that the District Court finds that the Homeowner Plaintiffs are entitled to recover fees and expenses pursuant to 42 U.S.C. §1988, that the motion be referred back to the magistrate judge for recommendation with respect to the amounts which should be awarded.

A copy of this recommendation shall be transmitted to counsel for the parties.

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[4] It is unnecessary to recount the numerous instances in which Movants seek to recover for time devoted to telephone conferences with the Walker Plaintiffs' counsel.

SIGNED this 27th day of August, 2001.

/s/ Wm. F. Sanderson, Jr.
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

169 F.3d 973

Debra WALKER, et al., Plaintiffs,

Debra Walker; Jeanette Washington; Hazel Williams; Zelma Lang; Renita Brown; Lillie Thompson, Plaintiffs-Appellees,

Tracey Smith, Intervenor Plaintiff-Appellee,

v.

CITY OF MESQUITE, TX, et al., Defendants,

Department of Housing & Urban Development, Defendant-Appellee.

Highlands of McKamy IV and V Community Improvement Association; Ginger Lee; Preston Highlands Homeowners' Association, Incorporated; David Beer, Plaintiffs-Appellants,

v.

The Housing Authority of the City of Dallas, Defendant-Appellee.

No. 97-11083.

United States Court of Appeals, Fifth Circuit.

March 16, 1999.

Michael M. Daniel, Laura Beth Beshara, Dallas, TX, for Plaintiffs-Appellees and Intervenor Plaintiff-Appellee.

Linda Frances Thome, U.S. Department of Justice, Appellate Section, Civil Rights Division, David Kevin Flynn, U.S. Department of Justice, Washington, DC, for Department of Housing & Urban Development.

Robert E. Goodfriend, Michael P. Lynn, Thomas M. Melsheimer, Eric Wolf Pinker, Lynn, Stodghill, Melsheimer & Tillotson, Dallas, TX, for Plaintiffs-Appellants.

Joseph G. Werner, Melissa Ann Miles, Haynes & Boone, Dallas, TX, for The Housing Authority of the City of Dallas.

Appeal from the United States District Court for the Northern District of Texas.

Before JONES and SMITH, Circuit Judges, and SHAW *, District Judge.

EDITH H. JONES, Circuit Judge:

The Dallas Housing Authority (DHA), the United States Department of Housing and Urban Development (HUD), and the City of Dallas were found liable several years ago for unconstitutional racial discrimination and segregation within Dallas's public housing programs. The primary issue on this appeal is the constitutionality of the provision of the district court's most recent remedial order that directs newly constructed units of public housing to be located in "predominantly white" Dallas neighborhoods.

Specifically, this is an appeal from a final judgment in two actions that were consolidated for trial. In the first action, two homeowners and their homeowners' associations ("Homeowners") sought declaratory and injunctive relief against DHA's construction of two new public

* District Judge of the Western District of Louisiana, sitting by designation.

housing projects adjacent to their neighborhoods.[1] The Homeowners challenged the remedial order's provisions for new public housing construction and race-conscious site selection alleging that these were not narrowly tailored to remedy the vestiges of past discrimination and segregation. In the second action, the original class plaintiffs, tenants in the public housing programs, sought declaratory relief that the remedial order provisions are constitutional. The district court entered judgment against the Homeowners in the first action and for the class plaintiffs in the second action. The Homeowners appealed. We essentially vacate and remand for further consideration by the district court.

I. BACKGROUND

Part of the convoluted history of this case is concisely recounted in *Walker v. HUD,* 912 F.2d 819, 821-25 (5th Cir.1990) [hereinafter *Walker IV*]. We will not repeat that history here, but some important procedural and substantive gaps in this court's prior opinion, which addressed different issues, should be filled in.

This case began in 1985 and initially resulted in a consent decree, which was approved by the district court in 1987. *See Walker v. HUD,* 734 F.Supp. 1231, 1247-72 (N.D.Tex. 1989) [hereinafter *Walker I*] (reprinting the district court's 1987 consent decree and its "Findings of Fact & Conclusions of Law Approving the Proposed

[1] The two homeowners' associations are: (1) Highlands of McKamy IV and V Community Improvement Association and (2) Preston Highlands Homeowners' Association, Inc.

Consent Decree"). The consent decree addressed the plaintiff class's[2] challenge under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 to the purposeful racial discrimination and segregation within DHA's public housing programs. The defendants were DHA and HUD. The City of Dallas was joined as both a defendant to the lawsuit and a party to the consent decree in 1989. *See Walker v. HUD,* 734 F.Supp. 1289 (N.D.Tex. 1989) [hereinafter *Walker III*]. The history of public housing in Dallas is a sordid tale of overt and covert racial discrimination and segregation. *See generally Walker III,* 734 F.Supp. at 1293-1312 (recounting in detail the history of public housing in Dallas). Virtually all non-elderly public housing units [3] were constructed in minority areas of Dallas.[4] No new public housing units were built between 1955 and 1989 at least in part for fear that they

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[2] The consent decree defined the plaintiff class as "all black persons presently or who during the pendency of this Decree become either (a) residents of a DHA owned or managed project, or (b) participants in the DHA Section 8 Existing Housing Program." *See Walker I,* 734 F.Supp. at 1263.

The plaintiff class will be referred to throughout this opinion as the "Walker plaintiffs." Deborah Walker is one of the named plaintiffs representing the class.

[3] "Public housing units" refer to housing units owned and operated by DHA. In contrast, under DHA's Section 8 certificate and voucher programs, participants rent housing units from private owners, and their rents are subsidized by DHA.

[4] In 1994, of DHA's approximately 6,400 public housing units, 6,100 were in minority areas and 300 were in predominantly white areas. An additional 75 units are currently under construction or just completed in a predominantly white area (Frankford & Marsh project), and the units at issue in this lawsuit would add another 80 units to predominantly white areas of Dallas.

might be located in white areas. Tenant selection and assignment procedures for public housing units were crafted and administered to maintain racially segregated projects. DHA's Section 8 housing programs were operated to discourage blacks from moving into white areas of metropolitan Dallas. *See id.* Blacks were purposefully segregated for decades into either Section 8 housing in minority areas of Dallas or predominantly black housing projects in minority areas of Dallas.

The 1987 consent decree required the demolition of approximately 2,600 units of public housing in DHA's West Dallas project, a public housing development located in a predominantly black area of the city and referred to by this court as "one of Dallas's worst slums."[5] *Walker IV,* 912 F.2d at 821. These units were to be replaced on a one-for-one basis with additional public housing units and Section 8 certificates and vouchers. *See id.* at 822. The decree also required that one hundred newly constructed replacement units be built in a predominantly white area of Dallas,

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[5] The West Dallas project was completed in 1955 and contained 3,500 units. In many ways, it is at the heart of this litigation. It was constructed to solve the "Negro housing problem." *See Walker III,* 734 F.Supp. at 1295. It is the second largest public housing project in the United States. *See id.* at 1296 n. 21. As of 1983, one-third of its units were so dilapidated as to be uninhabitable. *See id.* at 1307. In 1986, rejection rates for available units in the West Dallas project ranged from 58-60%. *See id.* at 1308. At that time, there were 1,583 vacant units of which 1,300 had been boarded up for more than ten years because of their deteriorated state. *See id.* The 1987 consent decree was designed to alter this concentration of public housing by requiring the demolition of all but approximately 900 of the West Dallas units, the reconfiguration and rehabilitation of the remaining units, and the creation of new public housing opportunities in predominantly white areas of the city and its suburbs.

that a nondiscriminatory tenant selection and assignment plan be implemented, and that a Section 8 mobility plan be established to assist black families joining the Section 8 program in finding housing in white areas of Dallas.[6]

DHA repeatedly violated the 1987 consent decree. First, it resisted the construction of the 100 units of new public housing in a predominantly white area. *See Walker I,* 734 F.Supp. at 1243-45. Site selection for and construction of the 100 units was eventually completed, but only by court order. *See id.* Second, DHA violated the tenant selection and assignment and mobility provisions of the decree. *See id.* at 1235-42. DHA failed to establish and fund the required Section 8 mobility program, failed to timely obtain fair market exception rents,[7] delayed implementing a nondiscriminatory tenant selection and assignment program, failed to include in Section 8 housing information a full list of all Section 8 units available in non-minority areas, and failed to use all of the Section 8

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[6] The Section 8 mobility program was designed to educate landlords about the Section 8 program and to assist Section 8 participants in locating Section 8 housing in non-minority areas of Dallas. Specifically, the program was to include landlord recruitment, exceptions to HUD's "fair market value" rent caps on Section 8 vouchers and certificates, Title VIII enforcement actions, and child care and transportation services. The program was also to provide neighborhood specific information on crime rates, job training and employment opportunities, day care, medical facilities, neighborhood shopping, transportation, social services, objective indicators of school quality such as TAAS test results, and "environmental hazards or other conditions inimical to family life."

[7] The value of a Section 8 voucher or certificate is capped by HUD at the "fair market rent." This cap, however, can be increased by special application to HUD.

certificates and vouchers allocated by HUD to DHA. *See id.*

In March 1992, the district court vacated the 1987 consent decree on the grounds that its terms were not implemented and that the vestiges of purposeful segregation persisted. Subsequently, the district court granted the Walker plaintiffs' uncontested motion for summary judgment on the issue of liability. In September 1994, the district court held a trial on the issue of a remedy. The district court entered its remedial order affecting DHA in February 1995 and its remedial order affecting HUD in April 1996.

The remedial order affecting DHA requires DHA (1) to demolish at least 2,630 units of its West Dallas project, (2) to develop 2,807 replacement units for the demolished West Dallas units through both new construction and Section 8 vouchers and certificates,[8] (3) to develop, either through construction or acquisition, an additional 3,205 new units of public housing in predominantly white areas of metropolitan Dallas in which the poverty rate does not exceed 13%, and (4) to develop *all* new public housing

[8] These 2,807 units have already been funded by HUD. The 2,807 units are made up of 774 new public housing units and 2,033 Section 8 certificates and vouchers. Specifically, the replacement units consist of (i) the 100 units constructed pursuant to court order from the 1987 consent decree, (ii) 1,335 Section 8 certificates and vouchers previously funded by HUD, (iii) 339 new public housing units allocated to DHA in 1990 and 1991 as part of the proposed 2,000 unit West Dallas project, (iv) 335 new public housing units allocated under HOPE VI in 1994 as replacement units for West Dallas, and (v) 698 additional Section 8 vouchers promised by HUD. Therefore, there are 674 new units of public housing currently funded but not under construction. Eighty of these units are specifically at issue in this case.

units in predominantly white areas until there are as many units in predominantly white areas as there are in minority areas.[9] A "predominantly white area" is defined as less than 37% Hispanic, black, or other minority. The required 3,205 new units may be satisfied by the use of Section 8 certificates or vouchers, but only after court approval.[10] The construction costs for 674 of the 2,807 new replacement units have been previously allocated to DHA

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[9] The source of this final detail of the district court's remedial order is unclear. The written order itself is confusing. Paragraph A.3 requires that all of the 3,205 new units be built in predominantly white areas.

In slight contrast, the district court reiterates throughout his oral and written opinions that all of the 674 new units of public housing (*i.e.*, the ones currently funded by HUD but not under construction) "and any other allocated in the future, must be developed in predominantly white areas until there are approximately as many non-elderly public housing units in those areas as in minority areas." 10/6/97 Written Opinion, at 22. The district court goes on to say, "The race conscious site selection remedy is limited. It applies only until there is a comparable number of public housing units in white and minority areas." *Id.* at 22-23; *see also* 8/25/97 Oral Opinion, at 22 ("Again, the 674 units must be placed in white non-minority areas until there are as many public housing units in white areas as in minority areas.").

[10] To date, no plan for the use of Section 8 certificates or vouchers has been submitted to the district court. However, HUD states in its brief to this court that it "expects to meet this obligation by providing funding for Section 8 certificates and vouchers for *all* of the 3,205 units, at a rate of 320 units per year for 10 years. Thus, it is likely that the only public housing units developed under the Remedial Orders will be the 774 units already allocated by HUD and designated as replacement units under paragraph A.1 of the HUD Remedial Order and paragraph A.2 of the DHA Remedial Order."

by HUD,[11] although only 75 of these units are currently under construction or completed.[12]

The Homeowners filed this suit against DHA and HUD to enjoin the construction of two new 40-unit public housing projects on sites adjacent to their neighborhoods.[13] The Homeowners allege that the remedy of new construction is not narrowly tailored because it requires that the new units be constructed in predominantly white areas. The Homeowners do not contest either the remedial order's poverty site-selection criterion or HUD's site-selection standards set forth in 24 C.F.R. § 941.202.

In response to the Homeowners' action, the Walker plaintiffs sought declaratory relief that the remedial order was constitutional. The Homeowners' request for an injunction and the Walker plaintiffs' declaratory judgment action were tried together in October 1996. The district court denied the Homeowners' injunctive relief and granted the Walker plaintiffs declaratory relief. The district court gave an oral opinion on August 25, 1997, entered final judgment on September 18, 1997, and issued its written opinion on October 6, 1997.[14]

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[11] The district court authorized that 200 of the replacement units may be used in the reconfiguration and revitalization of the West Dallas project.

[12] The 75 units either under construction or completed are at DHA's Frankford & Marsh site.

[13] One site is at the intersection of McCallum and Meandering Way, and the other site is at the intersection of Hillcrest and Highway 190.

[14] These opinions will hereinafter be cited respectively as: 8/25/97 Oral Opinion, 9/18/97 Final Judgment, and 10/6/97 Written Opinion.

II. STANDING

As an initial matter, DHA and HUD challenge the Homeowners' standing to bring their suit. The burden of establishing standing rests with the party seeking to invoke federal jurisdiction (*i.e.,* the Homeowners). *See United States v. Hays,* 515 U.S. 737, 743, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). In a case that has proceeded to final judgment, the factual allegations supporting standing (if controverted) must be supported adequately by the evidence adduced at trial. *See Hays,* 515 U.S. at 743, 115 S.Ct. at 2435; *Lujan,* 504 U.S. at 561, 112 S.Ct. at 2137; *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 115 n. 31, 99 S.Ct. 1601, 1616 n. 31, 60 L.Ed.2d 66 (1979); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 13A FEDERAL PRACTICE & PROCEDURE § 3531.15, at 105 (2d ed. 1984).[15]

The irreducible constitutional minimum of standing is composed of three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal

[15] "If this were an appeal from a judgment granting the defendants' motion to dismiss for lack of standing, we would be required to accept as true all of the material allegations of the complaint. However, because we are reviewing a final judgment based upon a fully developed record, we must evaluate standing from all materials of record." *Pollard v. Cockrell,* 578 F.2d 1002, 1006 (5th Cir.1978) (internal citations and quotations omitted).

> connection between the injury and the conduct complained of .... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Hays, 515 U.S. at 742-43, 115 S.Ct. at 2435 (quoting *Lujan,* 504 U.S. at 560-61, 112 S.Ct. at 2136) (internal citation and quotations omitted). In applying these constitutional standing requirements, the Court has adopted a prudential principle that bars the adjudication of "generalized grievances" against allegedly illegal government conduct.[16] *See id.* In the equal protection context, this prudential principle means that standing exists only for those persons who are personally denied equal treatment by the challenged discriminatory conduct. *See id.* (citing *Allen v. Wright,* 468 U.S. 737, 755, 104 S.Ct. 3315, 3326, 82 L.Ed.2d 556 (1984)); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 489 n. 26, 102 S.Ct. 752, 768 n. 26, 70 L.Ed.2d 700 (1982) (rejecting the proposition that every citizen has "standing to challenge every affirmative-action program on the basis of a personal right to a government that does not deny equal protection of the laws").

DHA and HUD principally contend that the Homeowners lack standing because they allege an injury that is

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[16] A "generalized grievance" is a harm "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). "The prudential principle barring adjudication of 'generalized grievances' is closely related to the constitutional requirement of personal 'injury in fact,' and the policies underlying both are similar." *Apache Bend Apartments, Ltd. v. United States,* 987 F.2d 1174, 1176 (5th Cir.1993) (en banc).

conjectural and a generalized grievance. The essence of the Homeowners' complaint is twofold: (1) they have been purposefully discriminated against because of their race (*i.e.,* they were intentionally singled out because of their race to accommodate two new public housing projects adjacent to their neighborhoods), and (2) this decision has inflicted or threatens to inflict specific injury including decreased property values, increased crime and population density, environmental problems, and diminished aesthetic values of the neighborhood because DHA will fail to operate and maintain the two projects properly. The remedial order's explicit racial classification alone is sufficient to confer standing on these particular homeowners. In *Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), the Supreme Court wrote regarding the "stigmatizing injury" caused by racial discrimination that "[t]here can be no doubt that this sort of non-economic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." *Id.* at 755, 104 S.Ct. at 3326. The Court continued, "Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.*; *see also City of Richmond v. J.A. Croson,* 488 U.S. 469, 493, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989) ("To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.").

Under the remedial order, DHA selected the homeowners' neighborhood because they are white and they live

in an area of Dallas that is at least 63% white. The remedial order also requires that new units not be located in areas where the poverty rate exceeds 13%. Thus, these homeowners' "whiteness" is one of two controlling elements which identified the specific sites adjacent to their neighborhoods for new public housing construction. When a homeowner's neighborhood adjoins a proposed public housing project whose site was determined by a race-conscious standard, he has standing to sue because of the explicit racial classification. *Cf. Hays,* 515 U.S. at 744-45, 115 S.Ct. at 2436 ("Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.").

DHA and HUD cite three cases to support their contention that the Homeowners' injury is a generalized grievance lacking the specificity and particularity necessary to confer standing. Each case is easily distinguishable from the case at hand. In *Warth v. Seldin,* 422 U.S. 490, 504-07, 95 S.Ct. 2197, 2208-09, 45 L.Ed.2d 343 (1975), the plaintiffs alleged that an adjacent town's zoning ordinances effectively excluded low and moderate income persons from living in the town, but they could not demonstrate that the ordinances specifically precluded them from living in the adjacent town. In *Apache Bend Apartments v. United States,* 987 F.2d 1174, 1177 (5th Cir.1993), the plaintiff-taxpayers were not seeking to litigate their own tax liability, but the tax liability of taxpayers who were not before the court. And in *Hays,* 515 U.S. at 744-45, 115 S.Ct. at 2436, 132 L.Ed.2d 635 (1995), the plaintiffs were denied standing to challenge a reapportionment plan because they did not live in the district that was the focus

of their claim. In contrast to these three cases, the Homeowners live in neighborhoods next door to the proposed new 40-unit housing projects, and the location of these projects was selected specifically because of the homeowners' race.

In general, the racial classification of the homeowners is an injury in and of itself. *See Shaw v. Reno,* 509 U.S. 630, 643, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) ("Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." (internal citations omitted)). But the Homeowners also allege that constructing two new 40-unit public housing projects adjacent to their neighborhoods will cause a decline in their property values and other problems involving crime, traffic and diminished aesthetic values. Relying on the district court's fact finding that the Homeowners have not suffered such an economic injury caused by the new public housing projects, HUD and DHA challenge whether the Homeowners have in fact suffered a decrease in property values. Despite this finding, we cannot conclude, having reviewed the record, that the Homeowners did not put forth adequate evidence at trial to confer standing upon them. The district court did not hold that the Homeowners lack standing, as he was well aware of the potential for neighborhood disruption traceable to improperly managed public housing projects. HUD and DHA cite no cases in which standing has been denied to homeowners who asserted their quality of life and property values would be diminished by a next-door public

housing or other HUD project. The caselaw is to the contrary.[17]

In sum, the Homeowners alleged and sufficiently proved facts that were adequate to support standing to sue.[18] The injury they assert is not too abstract or conjectural. The line of causation between the alleged unconstitutional conduct and the injury is not attenuated. And the

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[17] *See Alschuler v. HUD,* 686 F.2d 472, 476-77 (7th Cir.1982); *South East Lake View Neighbors v. HUD,* 685 F.2d 1027, 1034-35 (7th Cir.1982); *Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1054 (3d Cir.1980).

[18] As a subsidiary matter, DHA contends that the Homeowners lack standing because their alleged injury would not be redressed by the invalidation of the remedial order's requirement that public housing be built only in "predominantly white areas." In other words, DHA argues that it could have selected the two sites in question even without the race-conscious site selection criterion.

DHA applies the wrong legal standard. The test is whether DHA *would* have selected these two sites absent the race-conscious criterion, not whether it *could* have selected the sites. *See Warth,* 422 U.S. at 504, 95 S.Ct. at 2208 (framing the standing question as whether, absent the challenged zoning ordinances that allegedly excluded low-income persons from living in the town of Penfield, there was a substantial probability that the plaintiff would have been able to obtain such housing). There is no evidence in the record that DHA would have chosen the two sites in question absent the race-conscious criterion, and the Walker plaintiffs admit in their brief to this court that "[t]he record is clear that DHA would not have chosen the sites absent the court order."

Additionally, HUD argues that the Homeowners are challenging the wrong part of the remedial order by contesting the 3,205 additional units of public housing that must be built in predominantly white areas. It is quite clear from the record, however, that the Homeowners have properly challenged the two 40-unit projects, which were selected on a race-conscious basis to be built next to their neighborhoods. Obviously, these two projects are part of a larger remedial scheme that is affected by this court's opinion herein.

prospect of obtaining relief from the injury as a result of a favorable ruling is not speculative.

III. HOMEOWNERS' EQUAL PROTECTION CLAIM

The district court held that the Homeowners failed to allege an equal protection violation. The Homeowners challenge this conclusion.

A. Lack of a Similarly Situated Group

The district court, citing *Samaad v. City of Dallas,* 940 F.2d 925 (5th Cir.1991), found that the Homeowners failed to show an equal protection violation because they did not identify a similarly situated set of black persons who have been treated better. *See id.* at 941 n. 31. This requirement, however, applies only to equal protection claims involving facially neutral government actions, where it is necessary to establish that the government is distinguishing or classifying persons on the basis of race. *See id.* at 941. Explicit racial classifications, in contrast, establish unequal treatment by their very nature. *See Shaw,* 509 U.S. at 642, 113 S.Ct. at 2824 ("Laws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition."). Because the Homeowners challenge an explicit racial classification within the district court's remedial order, they have properly alleged an equal protection violation.

The district court also suggested that the Homeowners failed to demonstrate an equal protection violation because "[t]he impact [of the new construction], if any, on the Homeowners will be considerably less than [the] impact of the existing DHA public housing projects on the property owners in the black neighborhoods with existing

projects." The district court's reasoning is incorrect: racial classifications are not acceptable simply because they are perceived to have little impact. Any explicit racial classification, regardless of the burdens or benefits it imposes, is suspect and subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."); *Powers v. Ohio,* 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").

B. Intent to Discriminate

The district court held that the Homeowners failed to prove an equal protection violation because there is no intent to treat whites worse than similarly situated blacks. Once again, the district court is incorrect. An explicit racial classification does not require any inquiry into "intent" in order to allege an equal protection violation. *See Shaw,* 509 U.S. at 642, 113 S.Ct. at 2824 ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."). "Express racial classifications are immediately suspect because, '[a]bsent searching judicial inquiry . . . , there is simply no way of determining whether classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Id.* at 642-43, 113 S.Ct. at 2824 (quoting *Croson,* 488 U.S. at 493, 109 S.Ct. at 721).

The district court's skepticism of the Homeowners' right to pursue an equal protection claim was unfounded, so we proceed to address the merits of their claim.

IV. NARROW TAILORING

The primary issue on appeal is whether the remedial order's requirement that new public housing units be built or acquired in "predominantly white areas" is narrowly tailored to remedy the vestiges of past discrimination and segregation within Dallas's public housing programs. No party suggests on appeal that the racial steering, which for so many years was a part of Dallas's public housing programs, has not been effectively eradicated.[19] Rather, the parties' dispute centers on the district court's efforts to rectify the effects of the now-past discriminatory practices of DHA, HUD, and the City of Dallas. In short, is it constitutional in this case to implement a race-conscious site selection criterion for newly built or acquired public housing?

Any race-conscious remedial measure receives strict scrutiny under the Equal Protection Clause. *See Adarand,* 515 U.S. at 227, 115 S.Ct. at 2113; *Black Fire Fighters Ass'n v. Dallas,* 19 F.3d 992, 995 (5th Cir.1994) [hereinafter *BFFA*]. This is true no matter which race is burdened or benefitted by the racial classification in question. *See Adarand,* 515 U.S. at 224, 115 S.Ct. at 2111 (*citing Croson,*

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[19] *See* 8/25/97 Oral Opinion, at 5 ("From the very beginning the primary purpose that DHA had was to prevent blacks from moving into white areas of the city and the suburbs. That is not true of DHA today. . . . ").

488 U.S. at 494, 109 S.Ct. at 722). Strict scrutiny requires that a racial classification be (1) justified by a compelling government interest and (2) narrowly tailored to further that interest. *See Adarand,* 515 U.S. at 227, 115 S.Ct. at 2113. The Homeowners do not contest that there exists a compelling government interest in this case. Therefore, our inquiry focuses on whether the remedial order is narrowly tailored.

In assessing whether a remedy is narrowly tailored, courts are to assess five factors: (1) the necessity for relief, (2) the efficacy of alternative remedies, (3) the flexibility and duration of relief, (4) the relationship of the numerical goals to the relevant market, and (5) the impact of the relief on the rights of third parties. *See United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987); *BFFA,* 19 F.3d at 995. Before examining these factors, however, we must address the standard of review.

When a district court's race-conscious remedial measure is challenged as not being narrowly tailored, the party defending the remedial measure bears the burden of producing evidence that the remedial measure is constitutional. *See Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1848-49; *Aiken v. City of Memphis,* 37 F.3d 1155, 1162 (6th Cir.1994); *see also Raso v. Lago,* 135 F.3d 11, 20 (1st Cir.1998) (Stahl, J., dissenting). The party challenging the remedial measure, of course, bears the ultimate burden of demonstrating that the racial classification is unconstitutional. *See id.*

In general, we review a district court's legal conclusions de novo and its findings of fact for clear error. However, "if the trial court bases its findings upon a mistaken

impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Labs., Inc. v. Ives Labs., Inc.,* 456 U.S. 844, 855 n. 15, 102 S.Ct. 2182, 2189 n. 15, 72 L.Ed.2d 606 (1982); *see also United States v. Bentley-Smith,* 2 F.3d 1368, 1373 (5th Cir.1993).

In the case at hand, the district court placed the burden of production, as well as the ultimate burden of proof, on the Homeowners. Because he improperly placed the burden of production, we are not bound by the clearly erroneous standard in reviewing his findings of fact. Nonetheless, although more rigorous review may be in order, we will deferentially examine the district court's findings because this is a complicated case in which the district court has a decade's worth of experience with Dallas's public housing programs.

Race-conscious remedies must be narrowly tailored to eliminate the effects of past discrimination as well as bar like discrimination in the future. *See Paradise,* 480 U.S. at 172-175, 107 S.Ct. at 1067-68; *id.* at 183, 107 S.Ct. at 1073 (citing *Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965)). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Adarand,* 515 U.S. at 229, 115 S.Ct. at 2113 (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537, 100 S.Ct. 2758, 2805, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting)). This means that a race-conscious remedy must be framed to address the exact effects and harms of the discrimination at issue. *See Wygant,* 476 U.S. at 280, 106 S.Ct. at 1850.

In application, arriving at an exact fit between harm and remedy requires consideration of whether a race-neutral or less restrictive remedy could be used. *See Adarand,* 515 U.S. at 237-38, 115 S.Ct. at 2118; *Wygant,* 476 U.S. at 280 n. 6, 106 S.Ct. at 1850 n. 6. This is because a race-conscious remedy should be the remedy of last resort. *See Alexander v. Estepp,* 95 F.3d 312, 316 (4th Cir.1996) ("[E]xplicit racial preferences, if available at all, must be only a 'last resort' option."). A "race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives – particularly race neutral ones – have been considered and tried." *Williams v. Babbitt,* 115 F.3d 657, 666 (9th Cir.1997).[20]

The first two *Paradise* factors are the necessity for relief and efficacy of alternative remedies. These weigh against race-conscious site selection for two reasons. First, Section 8 housing vouchers have not been given a fair try to prove their potential to desegregate. Second, other

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[20] It is true that in *Hills v. Gautreaux,* the Supreme Court did not disapprove a remedial order which, to end discrimination in public housing, required housing to be built in nonblack neighborhoods of Chicago. *See* 425 U.S. 284, 296, 96 S.Ct. 1538, 1546, 47 L.Ed.2d 792 (1976). But the Court did not consider the propriety of that remedy as opposed to a non-race conscious remedy like a vigorous Section 8 program. The only disputed issue in that case was whether the remedy could extend beyond the city limits of Chicago. Further, *Hills* predates significant changes that have occurred both in HUD's approach to public housing and in the scrutiny afforded race-conscious remedies. *Hills* does not mandate either the construction of new public housing or race-conscious site selection. We must review the application of the *Paradise* factors, which the district court correctly understood to frame the issues here.

criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing. *See infra,* text at n. 31.

The Homeowners argue that Section 8 alone is capable of remedying the effects of past discrimination in Dallas's public housing programs, and they contend that Section 8 has not been given a fair try. They also point out, and the district court agrees, that Section 8 is more cost-efficient than new construction and is preferred by the majority of public housing program participants. Section 8 is more flexible than fixed public housing because the participants may decide where and in what type facility to reside. As a result, virtually all available Section 8 vouchers have been snapped up in Dallas.

Unfortunately, however, numerous programs that would encourage and assist black families to use Section 8 in predominantly white areas had been in effect or fully operational for only a short time before trial on the Homeowners' case. For instance, the record indicates that DHA's mobility program had been operating as originally proposed by the Walker plaintiffs and the district court since only approximately 1994.[21] In addition, exceptions to the "fair market rent" caps on Section 8 vouchers and

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[21] *See* 10/30/96 Testimony of Ann Lott, Director of DHA's Section 8 Mobility Program (agreeing that most of the efforts to improve DHA's mobility program have been within the preceding two years); 8/7/96 Deposition of Lott (explaining new procedures within DHA's mobility program that were implemented in the prior year, including a marketing campaign for prospective landlords, a landlord newsletter, and private briefings for landlords on the Section 8 program). *But see* 10/30/96 Testimony of Lori Moon, President & CEO of DHA (stating that DHA's mobility efforts have been in effect since 1989).

certificates have been slow in coming.[22] It also appears that potential Section 8 landlords may now be paid "signing bonuses" for accepting Section 8 tenants. These are but three examples of numerous "helping-hands" that may be employed to promote the success of Section 8 as a desegregation tool.[23] While the history and timing of their implementation by DHA and HUD in this case are not perfectly clear, it is evident from the record that they were not programs of long-standing before trial. If Section 8, combined with such assistance programs, is an effective desegregation tool, then Section 8 is superior to a race-conscious remedy in that it allows market forces and personal preferences rather than racial criteria to guide the homemaking decision.

The district court found, agreeing with the Walker plaintiffs, DHA, and HUD, that Section 8 needed to be combined with new construction or acquisition in predominantly white areas in order to remedy the effects of past discrimination. Adopting the Walker plaintiffs'

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[22] It is unclear from the record whether HUD has granted DHA a 120% fair market exception rent across-the-board for all Section 8 housing in predominantly white areas. It is also unclear whether DHA could be granted fair market rent exceptions higher than 120%. Evidence in the record shows that a 160% fair market exception rent would significantly increase the availability of Section 8 housing in predominantly white areas. Prior to implementing a race-conscious remedy, it would seem advisable to ensure (1) that rent exceptions above 120% are foreclosed, as they offer the potential to break-down a significant barrier to an even more effective Section 8 program, or (2) that 120% fair market exception rents have been fully implemented and tried, if that is the statutory maximum.

[23] Another example would be the vigorous enforcement of state and federal laws prohibiting racial discrimination by private Section 8 landlords.

proposed findings of fact and conclusions of law *in toto,* the court concluded that Section 8 alone was an inadequate remedy for several reasons: there are not enough Section 8 units in predominantly white areas; among the available units there is a lack of three and four bedroom units; rents in predominantly white areas are too high to be covered even by Section 8's fair market exception rents; landlords do not want to participate in the Section 8 program; and Section 8 participants become frustrated in looking for housing in predominantly white areas and settle for housing in minority areas. The court also found that rental contract requirements in predominantly white areas contain provisions that are difficult for Section 8 families to meet (*e.g.,* high security deposits, requirement of having held a job for the past year, *etc.*). We neither accept nor attempt to reject these factual findings. Rather, there is one overarching factual finding by the district court – which is uncontested by all parties – that transcends the parties' objections to Section 8 as a remedial measure.

In 1987, when the district court first found DHA in violation of its original consent decree, a negligible number of black families in DHA's Section 8 programs lived in predominantly white areas.[24] In contrast, in September 1994, approximately 1,050 Section 8 black families lived in predominantly white areas.[25] And in the fall of 1996, there were approximately 1,335 Section 8 black families in

[24] The Walker plaintiffs state that in 1987 there were 66 Section 8 black families living in predominantly white areas, which amounted to approximately 2.4% of all black families in DHA's Section 8 program.

[25] According to testimony in the record, this amounted to approximately 21% of all black families in DHA's Section 8 program.

predominantly white areas. [26] These numbers show that in the two year period between 1994 and 1996, the number of Section 8 black families living in predominantly white areas increased by 285, or 27%. And it was during this same time period that DHA's Section 8 mobility program was getting fully underway. The program currently in place, which the district court has not criticized, essentially became fully operational around 1994. Based on the relative success of DHA in moving blacks into predominantly white areas via its Section 8 program between 1994 and 1996, the Walker plaintiffs, HUD, and DHA have produced insufficient evidence to show that the district court's race-conscious site selection criterion is necessary to remedy the effects of past discrimination. *Cf. In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1545-47 (11th Cir.1994);[27] *see also BFFA*, 19

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[26] According to testimony in the record, this amounted to approximately 24-25% of all black families in DHA's Section 8 program.

[27] In *In re Birmingham Reverse Discrimination Employment Litigation*, nonblack employees of the Birmingham Fire Rescue Service (BFRS) challenged a 1981 consent decree entered into by the City of Birmingham that required, *inter alia*, that 50% of all promotions to the rank of BFRS lieutenant would be filled by qualified blacks (*i.e.*, for every two promotions to lieutenant, one must be filled by a black candidate). *See id.*

The 11th Circuit noted that between 1978 and 1981, BFRS significantly increased its total number of black employees from 8 to 42, which represented a shift in the black percentage of BFRS's workforce from 1.89% to 9.3%. *See id.* This was achieved without the use of a race-conscious remedy. *See id.* The court stated that "there is strong evidence in the record of this case that the City had implemented effective alternatives to race-based quotas to remedy its prior discriminatory behavior." *Id.* "While the district court correctly concluded that, when the decree was entered, no black had as yet become a fire lieutenant, we believe that, given the City's progress at the entry-level, alternative

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F.3d at 995 ("The broad skip promotion remedy in the decree is difficult to justify when the knowledge to narrow it seems readily available."). Section 8, a race-neutral remedial measure, is increasingly successful at moving black families into white areas, and the record indicates that it could be even more successful with, for example, increased funding for both more vouchers and the mobility program,[28] more mobility counselors,[29] and higher fair market exception rents.[30] When Section 8 has evidenced such promising results, options such as these should be explored and tested before adopting a race-conscious remedy as a last resort.

Additionally, it is unnecessary to employ the race-conscious site selection criterion ordered by the court even if new construction or acquisition of public housing occurs. The district court may proceed with new construction as part of his remedial plan, but he may not do so using a

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measures designed to increase black representation in the fire lieutenant ranks were feasible." *Id.* The court proceeded to list the non-race-based remedies that the plaintiffs proposed regarding promotion to BFRS lieutenant. *See id.* at 1546-47. It then concluded, "Considering the efficacy of the alternative remedies, the relief provided in the decree cannot be reconciled with the requirement that a government's use of race must be narrowly tailored." *Id.* at 1547.

[28] *See* 10/30/96 Testimony of Ann Lott, Director of DHA's Section 8 Mobility Program, at III-43 (stating that DHA is able to use virtually every Section 8 voucher or certificate funded by HUD); *see id.* at III-65 (stating that DHA could put to use an additional 1,500 Section 8 vouchers).

[29] *See id.* at III-67 (stating that the mobility program could use more counselors).

[30] *See id.* at III-57 (stating that higher fair market exception rents would assist in obtaining more Section 8 housing in predominantly white areas).

race-conscious site selection criterion. Of course, other criteria may be employed to guide site selection for new construction. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184, 1236-37 (2d Cir.1987) (using a geographical site selection criterion for public housing). The district court has already mandated that all new sites be in areas where the poverty rate does not exceed 13%.[31] The district court's concern that if it does not attach a race-conscious site selection criterion to new construction, then the new units will end up in minority areas and, as a consequence, Dallas's public housing projects will almost all remain in minority areas, is unfounded.[32]

In deciding that Section 8 and nonracial site selection criteria should be implemented before a racial standard, we are mindful of the "respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment." *Paradise*, 480 U.S. at 183, 107 S.Ct. at 1073. Nonetheless, a district court's broad equitable powers remain constrained by the boundaries of narrow tailoring.[33] The recent success of

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[31] It is suggested in a brief that this criterion essentially restricts the areas available for new construction to predominantly white areas.

[32] Moreover, the district court referred throughout his 8/25/97 Oral Opinion and 10/6/97 Written Opinion to the danger of losing the funds already allocated to new construction because they could not be transferred to the Section 8 program. This may be true. Nonetheless, it does not justify the use of a race-conscious site selection criterion.

[33] *See Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir.1993) (*en banc*); *Wessmann v. Gittens*, 160 F.3d 790, 808 (1st Cir.1998) ("*Croson*, in particular, leaves no doubt that only solid evidence will justify allowing race-conscious action. . ."); *id.* ("Our dissenting brother's valiant effort to read into *Croson* a broad discretion for

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Section 8 and the availability of viable nonracial, nondiscriminatory site selection criteria, combined with the factors discussed in the following paragraphs, demonstrate that the remedial order's race-conscious site selection criterion is not narrowly tailored.

First, DHA, HUD, and the City of Dallas are all cooperating defendants. That is to say, DHA, HUD, and the City of Dallas no longer discriminate against black families in DHA's public housing programs, and – by all accounts in the record – all three defendants are active participants in crafting and implementing remedial measures to eliminate the vestiges of past discrimination. In contrast, the Supreme Court approved a race-conscious remedy in *Paradise* in large part because earlier, less restrictive remedies had proven ineffective since the defendant continually resisted their implementation and stonewalled in developing acceptable procedures for the advancement of black troopers within the Alabama Department of Public Safety. *See Paradise,* 480 U.S. at 162-65, 107 S.Ct. at 1062-63 (describing the Department's continuing failure to comply with the parties' consent decrees); *id.* at 170-71, 176-77, 107 S.Ct. at 1066, 1069; *see also BFFA,* 19 F.3d at 996 (finding a race-conscious remedial measure unnecessary, in part, because the defendant was a willing party to the settlement of the lawsuit). Where, as here, the defendants have begun making race-neutral, good faith, and effective efforts to remedy the wrongs of the past, a race-conscious remedy should only be a last resort.

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government entities purporting to ameliorate past discrimination strikes us as wishful thinking.").

Second, the district court, in his 8/25/97 Oral Opinion, made references to the necessity of a race-conscious site selection criterion because some participants in DHA's public housing programs do not want and should not be forced to use Section 8.[34] While some may find it difficult to use Section 8, a race-conscious remedial measure is not justified by certain class members' objections to looking for housing on their own versus their being offered a unit owned and operated by DHA. A race-conscious remedy is justified, after race-neutral remedies have been considered and found wanting, if it is the only effective means by which to remedy the effects of past discrimination. It is by this standard alone that the district court must assess his remedial orders. As applied to the facts of this case, the district court's concern seems particularly irrelevant as only 474 new units in predominantly white areas are currently funded, and those units must be filled by Section 8 families who participate in DHA's Family Self-Sufficiency Program.[35] That is, they will be filled by the

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[34] *See, e.g.*, 8/25/97 Oral Opinion, at 28 ("Even if this money [for new public housing construction] could be reprogrammed for Section 8, there would still be a need for the use of public housing in the desegregation plan. Section 8, although the preferred method, is not the only method. Indeed, there are members of this class who made it evident, abundantly clear to this Court, that they did not trust Section 8, they would not use Section 8, and they should not be forced to use Section 8."); *id.* at p. 33 ("I recognized then, as I do now, that although Section 8 certificates and vouchers may be the preferred method for most people, for many people there are risks in Section 8 that not all class members would want to take. I declined to force those risks upon unwilling class members.").

[35] DHA's Family Self-Sufficiency Program is a voluntary program that requires participants to, for instance, be employed or attend school. The participants sign a five-year contract with DHA in which they agree to abide by the program's regulations. In essence, the program is

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"cream-of-the-crop" from DHA's waiting lists. Thus, those who in all probability need public housing units the least (because they would be successful Section 8 participants) will be directed to the new units, while those for whom the district court expresses concern will be left with Section 8. DHA's rationale for filling the new units with participants in its self-sufficiency program is commendable, but it throws askew part of the district court's reasoning regarding the remedial need for new construction in addition to Section 8.

Third, it remains unclear why there is an absolute remedial necessity to build 474 new units of public housing using a racial classification when (1) 2,033 (or 72%) of the remedial order's 2,807 replacement units will be Section 8 and (2) DHA and HUD may submit a plan to use Section 8 for all of the 3,205 additional units of public housing to be built in predominantly white areas.[36] In sum, out of a total of 6,012 units within the remedial order, only 474 (or 8%) must – *assuming* an acceptable Section 8 plan is submitted for the 3,205 additional units – be new construction in predominantly white areas. If Section 8 can effectively satisfy the district court's remedial goal regarding 5,628 units, it is baffling to assume that it cannot do so for an additional 474 units.

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designed to make its participants self-sufficient by providing them with "upward mobility type assistance." 8/7/96 Deposition of Lori Moon, President & CEO of DHA, at 110.

[36] As noted previously, HUD states in its brief to this court that it intends to fulfill its entire obligation regarding the 3,205 additional units with Section 8 vouchers or certificates.

DHA, HUD, and the City of Dallas offer two responses to this criticism. First, they argue that 474 units is a tiny proportion of the overall number of units contemplated by the remedial order; the deference due a district court in fashioning a remedial order should protect such a small element of the overall remedial plan. This would be correct if the 474 units were not attached to a racial classification which requires that they be built in predominantly white areas. Racial classifications, even small ones, receive strict scrutiny. Second, they contend that if the 474 units already funded by HUD are not built in white areas, they will either not be built at all or will be built in minority areas which will only further the racial segregation of DHA's public housing projects. As discussed previously, the district court may entertain any number of site selection criteria regarding new public housing units, except for race. No one suggests that the 474 units should not be built, only that requiring that they be built using a race-conscious site selection criterion is not narrowly tailored.

The fourth *Paradise* factor, the relationship of numerical goals to the relevant markets, also cuts against the race-conscious site-selection criterion in the remedial order.[37] The district court's remedial goal is to have half of the families in DHA's public housing programs (either public housing units or Section 8) in predominantly white areas of Dallas and half in "minority areas". The justification for this goal is that Dallas's population is approximately half white and half "minority" and, therefore, public housing should be divided accordingly. This goal is

[37] The third *Paradise* factor considers the flexibility and duration of relief. On balance, that factor is neutral in this case.

overly broad. This suit was brought by black plaintiffs on behalf of a class of black plaintiffs. There is no suggestion that the suit ever expanded to include all minorities or that any liability of the public agencies to other minorities could be found. The court's definition of a "predominantly white" neighborhood, with 63% white population, is also based on the idea that public housing may not be placed in neighborhoods with higher concentrations of Hispanics. There is no evidence in the record to support the court's arbitrary definition of a predominantly white neighborhood. The emphasis should instead be directed toward placing public housing participants in neighborhoods of their choice through a vigorous Section 8 program, non-black neighborhoods, census tracts in which no public housing currently exists, or non-poor neighborhoods.[38]

The fifth *Paradise* factor is the impact of a racially-conscious site selection criterion on the rights of third parties. Among all the groups affected by Dallas public housing, only these Homeowners have maintained that they would be injured by the racially-based site selection process that occurred here. Despite the court's having purportedly found against them on this issue, the totality of the remedial order is far more ambivalent. The district court ordered stringent criteria for the design and upkeep

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[38] According to the Walker plaintiffs' brief, at 11: "There are 113 county census tracts with 63% or greater non-Hispanic white population, 95 of which have a poverty population less than the county average. There are an additional 20 tracts with a non-Hispanic white population between 50% and 63%. Only seven of these tracts have a poverty rate less than the county's. There are an additional 16 tracts with a poverty population below the county average but the non-Hispanic white population is less than 50%."

of the projects and for tenant selection here and in another "predominantly white" neighborhood (the Frankford & Marsh site, *see supra*, n.12), and he called for the participation of neighboring community members, like these Homeowners, in planning the projects. The court showed considerable sensitivity to the fact that public housing has in the past been disgracefully neglected in Dallas. The resulting remedial order thus cuts both ways with respect to the Homeowners' rights. On one hand, it attempts to placate their fears of deterioration in their neighborhoods. On the other hand, it lends credibility to those fears.

Because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, the provision of the court's remedial order calling for the construction or acquisition of units of public housing in "predominantly white" areas is unconstitutional. Under the balance of the *Paradise* factors, the criterion is not narrowly tailored, and it is premature to utilize such a last-resort measure. We must vacate and remand this portion of the remedial order for further consideration.

In so doing, we emphasize several points. First, increased reliance on Section 8 demands that the public agencies implement a vigorous mobility plan that serves the relocation needs and concerns of black families, reaches out to white landlords, affords adequate fair market rent exceptions, and combats illegal private discrimination. Second, this opinion does not deal with the remedial order's nondiscriminatory tenant selection and assignment provisions, which are not challenged by the Homeowners. Third, this opinion does not preclude the construction or acquisition of additional public housing if sites are selected by means of nonracial criteria. But we also recognize that Section 8 is overwhelmingly preferred

by public housing families, that it allows market forces and personal preferences to control the homemaking decision, and that it has not proven ineffective at desegregating Dallas's public housing programs when combined with a vigorous mobility program. As applied to the facts of this case, the district court erred in employing a race-conscious remedy before utilizing race-neutral alternatives.

V. CONCLUSION

For the foregoing reasons, the district court's remedial order is VACATED to the extent indicated and the case is REMANDED for further proceedings; the declaratory judgment awarded to the Walker plaintiffs is REVERSED; and this court's stay of construction at the sites adjacent to the Homeowners' subdivisions shall be ENFORCED until the district court holds additional hearings and enters a remedial order revised in accordance with the foregoing opinion.

Remedial order VACATED and REMANDED; declaratory judgment for Walker plaintiffs REVERSED; stay ENFORCED pending entry of revised remedial order.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEBRA WALKER, ET AL.	*	
v.	*	CIVIL ACTION NO.
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,	*	3:85-CV-1210-R
and	*	CLASS ACTION
U.S. DEPARTMENT OF JUSTICE.	*	

REMEDIAL ORDER AFFECTING DHA

(Filed Feb. 7, 1995)

Vestige A. 2,876 (92%) of the 3,116 black households in DHA's non-elderly public housing projects units[1] reside in predominantly black or minority concentrated projects in predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79]. 6,133 of the 6,411 units in DHA's non-elderly public housing projects are in these predominantly black or minority concentrated areas where the poverty rate exceeds 40% [plaintiffs' 9/27/94 exhibit # 79].

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[1] These figures exclude the approximately 46 single family homes for which DHA does not separately report racial occupancy data [plaintiffs' 9/27/94 exhibit # 68 – excerpt from DHA monthly report].

DHA is ordered to take the following actions to eliminate this vestige:

A.1. demolish at least 2,630 units of the public housing in the West Dallas project.

A.2. provide one-for-one replacement units for each unit to be demolished before the demolition of that unit. The 100 public housing units and 1,335 Section 8 certificates and vouchers previously provided by HUD are one-for-one replacement units. The 339 public housing units allocated to DHA since 1990 are one-for-one replacement units. The 335 public housing units allocated under the HUD Urban Revitalization Demonstration Grant are one-for-one replacement units. The additional 698 Section 8 vouchers promised in the HUD plan submitted to the Court are one-for-one replacement units to the extent that HUD and DHA are proceeding with demolition under the previously approved demolition plan and if the number of units in the one, two, three, four, and five bedroom unit categories being replaced are matched in the allocations of replacement units. If a new demolition plan is approved then the 42 U.S.C. 1437p prohibition against the use of vouchers as replacement units will apply.

A.3. Develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas. These units shall be in place and occupied before any non-family units or any units in non-predominantly white areas are developed. The restriction set out in the immediately preceding sentence does not apply to the use of public housing units in the reconfiguration of the West Dallas projects provided for in ¶ B.7. of this order. The site for each unit must be approved by the Court and the units, projects, and neighborhoods for the

units must provide housing opportunities substantially equivalent to the units, projects, and neighborhoods in and around the predominantly white located HUD assisted projects in Dallas County. The units may not be located in areas where the poverty rate exceeds 13%, the county average. The development of these units is dependent upon the provision of funding for public housing or comparable programs by HUD to DHA.

A predominantly white area, as this term is used in this order, is determined by first computing the racial composition of the geographic area within a one-quarter mile radius of the center point of the center of the proposed location of the project. If the population, using the block level data for the most current US Census, is less than 37% total non-Hispanic African-American, Hispanic, or other minority persons, then it may be a predominantly white area. The area is not a predominantly white area if it is located on or near a dividing line, such as a highway, major thoroughfare, or railroad tracks, between a predominantly white area and a racially concentrated minority area. The area is not a predominantly white area if it is located in an isolated, non-residential area. The relevant area for the determination of the poverty rate shall be the US Census census tract block group in which the site is located.

The already allocated 674 units of new public housing units shall be occupied within 3 years of the date of this order or, if allocated for suburban development within 3 years and 6 months of the date of this order, unless an extension is granted by the Court for good cause.

A.4. DHA shall make an application for public housing assistance at each available opportunity. All units

allocated by HUD in the future shall be occupied within 3 years of the date of the allocation unless an extension is granted by the Court for good cause.

A.5. 350 of the currently available new public housing units and 50% of all subsequent allocations shall be tentatively reserved for use in predominantly white areas of the Dallas suburbs. DHA shall request that the suburbs enter into a cooperation agreement with DHA to allow the development of a reasonable number of public housing units in each suburb. If there are not enough suburban cooperation agreements signed or suburban sites available for acquisition within 6 months of the date of this order, then DHA shall develop the units in predominantly white areas of the City of Dallas. The three years for the initial occupancy of these units will begin to run after the expiration of 6 months from the date of the order.

A.6. DHA shall request the assistance of Dallas County, Texas, as part of the County's compliance with its obligation to affirmatively further fair housing in its housing and community development related activities, in securing cooperation agreements between DHA and the area suburbs.

A.7. Given the applicants' and residents' stated preference for Section 8 units, DHA is urged to devise and submit for court approval a plan which would use Section 8 certificates and vouchers to substitute for at least part of the future allocations of new public housing in predominantly white areas. In order to be approved by the Court such a plan must:

a. ensure that the Section 8 units are from an allocation over and above DHA's past allocations and over and above DHA's future fair share allocation and are not

provided as a substitute for any units which would be provided to DHA under the normal allocation process. The housing assistance must be over and above what DHA or the City would otherwise receive from HUD, and can have no effect on the amounts of future assistance HUD may provide or award to DHA or the City, and

b. ensure that the certificates and vouchers for which an offset against the new public housing development is claimed are and will be in use in predominantly white areas for the foreseeable future.

A.8. DHA may use a race conscious tenant selection method for the purposes of preventing or reducing racial identifiability if every person skipped over because of race is provided an equivalent [in terms of cost to the tenant, convenience and suitability for the family's individualized needs and location preferences] alternative housing opportunity. Before use, the method shall be submitted to the Court for approval. The race conscious tenant selection and assignment method should be used only in those instances where the desegregative benefit is substantial enough to justify the use of the resources for the alternative housing opportunities needed to achieve the benefit.

A.9. DHA may use a tenant selection and assignment method which maximizes applicant choice to the extent the exercise of such choice does not unavoidably cause or maintain racially identifiable projects. For example, if there are 10 units in predominantly black projects available and the top ten applicants on the list are black, then the exercise of choice will not unavoidably cause or maintain racially identifiable projects. If there are 7 units in predominantly black projects and three units in a non-racially identifiable project and the top ten applicants 7

blacks and 3 whites, then the exercise of choice could cause or maintain racially identifiable projects depending on the preferences of the individual applicants.

A.10. Until another method is approved by the Court, DHA shall make the applicant with the oldest application date one offer which if refused results in placement at the bottom of the waiting list. If any appropriate units vacant at the time of the offer is located in an area or project where the applicant's race does not predominate, those units shall be offered to the applicant. Any offer to the West Dallas project may be refused by an African-American applicant and that applicant shall not lose her place on the waiting list. Any offer of a unit in a predominantly white project or location may be refused by a white applicant and that applicant shall not lose her place on the waiting list.

A.11. DHA shall ensure that each African-American household accepting a non-elderly, handicapped, or disabled designated public housing shall be placed on the Section 8 waiting list with an application date of the acceptance of the public housing. If the person accepting public housing is already on the Section 8 waiting list, then the application date is the actual application date. Each African American household in a non-elderly, handicapped, or disabled designated public housing unit who is also on the Section 8 waiting list shall have a desegregated housing opportunity preference equal to a federal preference.

A.12. A racially identifiable minority public housing project has 75% or more non-Hispanic black, Hispanic, or other minority total population. A racially identifiable

white public housing project has 75% or more non-Hispanic white total population.

A-13. Propose and implement a plan, as approved by the Court, providing magnet project improvements for any family project located in minority racially concentrated areas for which there is not a substantial decline in racial identifiability within the three years after the unit, project, and neighborhood improvements required below are completed.

> **Vestige B.** The units, projects, and neighborhoods available for the black occupants of and applicants for DHA's low rent public housing projects are substantially inferior to the conditions in which low income whites receive HUD assistance [plaintiffs' 9/27/94 exhibits ## 62-66, 68-80]. *Walker v. HUD*, 734 F.Supp. 1231, (N.D. Tex. 1989).

DHA is ordered to take the following actions to eliminate this vestige:

B.1. Prepare and submit for court approval a schedule for achieving the unit and project improvements necessary to make the unit and project conditions at DHA's projects substantially equal to the unit and project conditions at the HUD assisted projects located in predominantly white areas of Dallas and including the improvements listed in paragraphs 32-35 on pages 23-25 and 38-46 on pages 26-27 of the DHA proposed permanent injunction for each DHA project. The schedule should be drafted to achieve the improvements in the least possible time given the funding likely to be available and list the possible sources of funding for each improvement. Priority should be given to achieving the improvements in security

necessary to achieve a safe environment within each project. The projects with the highest crime rate should be given priority in the funding for the prevention of crime.

B.2. The funding available for these improvements includes the $15,000,000 in CIAP funding and DHA's formula Comprehensive Grant Program funding. Future funding may become available through other programs from local or federal agencies. DHA shall make application for all funding which could be used to address the inequalities affecting its public housing program. DHA's ability to achieve the improvements in B.2. is limited by the resources available, the need to maintain all of its units in decent, safe, and sanitary condition, and to comply with the statutory and regulatory requirements of DHA's low income housing programs.

B.3. HUD has the authority to increase DHA's operating subsidy beyond the performance funding system formula amount when necessary because of circumstances beyond DHA's control. 42 USC § 1437g; 24 CFR 990.108(d). This order requiring a remedy for the constitutional and statutory violations of racial segregation is just such a circumstance. HUD has itself admitted the need for such increased funding by its continued provision of the operating subsidy for the vacant West Dallas units. DHA shall take the remedial needs imposed by this order into account when submitting its request for its operating subsidy from HUD. If the subsidy provided, in combination with other funding actually available to DHA, does not allow DHA to meet the obligations imposed under this order within a reasonable time, DHA or the plaintiffs may apply to the Court for relief.

B.4. The neighborhood conditions around DHA's projects which must be addressed in order to achieve substantial equality with the conditions in and around the HUD assisted projects in predominantly white areas include those listed in B.5. below.

B.5. The conditions adversely affecting all or some of DHA's projects include:

a. high rates of crime,

b. exposure to industrial uses and environmental hazards,

c. inappropriate industrial zoning,

d. unsatisfactory streets, curbs, drainage, sidewalks, lighting and other municipally provided facilities,

e. lack of neighborhood commercial services such as grocery stores, pharmacies, banks or other financial institutions, and medical facilities,

f. lack of decent, standard, affordable, single family units in the neighborhoods around the projects for the persons now residing in those neighborhoods who wish to remain in those areas,

g. high concentrations of poverty households and households on public assistance, and

h. public schools challenged by high percentages of students failing to pass minimum competency tests.

B.6. DHA's ability to affect these neighborhood conditions around the existing projects is limited to the operation of its own projects and to requesting actions by local and federal agencies and the private sector. DHA's

plan for improvement of the neighborhood conditions shall include the determination of which agencies and institutions can improve the conditions and a request to those agencies and institutions for the actions which will improve the conditions.

B.7. In addition to the improvements listed for each DHA project, DHA shall implement a reconfiguration of and improvements to the West Dallas project units consistent with the concepts in the Lakewest Master Plan submitted to the Court under the following conditions:

a. no more than 950 units of public housing may remain in place after the configuration and improvements and this number shall be reduced by the number of City Consent Decree ¶ 3.5 units provided as part of the reconfiguration,

b. prior to the use of any new public housing units in the reconfiguration of the West Dallas project, DHA and plaintiffs shall seek the cooperation of the City of Dallas in provision of up to 200 necessary infill units under ¶ 3.5 of the City Consent Decree in this case.

c. In the event that City Consent Decree ¶ 3.5 units are not available in time to be used in the reconfiguration of the first village no more than a total of 50 new public housing units may be used in the reconfiguration and improvements of that village,

d. In the event that no City Consent Decree ¶ 3.5 units become available for use in the reconfiguration of the West Dallas projects, no more than a total of 200 units of new public housing may be used in that reconfiguration. The use of these units shall not result in more than 950 public housing units remaining in place after the reconfiguration.

e. Plaintiffs are arguing for a provision in the order that would prohibit any reconfiguration or improvements to the West Dallas site "until the status of the RSR/ Murmur site on the National Priorities List and any remedial efforts have been fully resolved." DHA opposes this language because "there is no evidence of any significant environmental health hazard to residents of DHA's West Dallas developments arising out of lead contamination connected with the RSR/Murmur site" and thus there should be no reason to delay the construction of improvements in West Dallas [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. This paragraph is the only paragraph in this order that has not been consented to by DHA [DHA's Response to Plaintiffs' Motion for Entry of Remedial Order Affecting DHA, page 1]. Therefore, the resolution of this issue will be set for a future hearing and resolution by the Court.

f. any construction, rehabilitation, excavation or other construction work will be done in compliance with all necessary safeguards against releases of hazardous substances,

g. DHA has requested a change in zoning to provide an adequate "buffer zone" between the industrial zoning and uses on Singleton Blvd. and the areas of the West Dallas project to be used for residential purposes.

h. the tenant selection and assignment plan shall provide that no applicant shall lose her or his place on the waiting list because a unit in the West Dallas project has been rejected,

i. the specific reconfiguration and improvements have been approved by the Court.

B.8. DHA shall submit a plan for achieving and maintaining substantial equality of conditions in DHA's existing and future projects to the Court for approval within 90 days of the date of this order.

> **Vestige C.** At least 2,850 [59.2%] of the black households on DHA's Section 8 certificate and voucher program live in predominantly black or racially concentrated and low income areas. Only 21% of those households live in predominantly white areas. 45.6% of white DHA Section 8 households live in predominantly white areas.

C.1. DHA's September, 1994 survey showed that at least 23% of those on the waiting list preferred housing in the suburbs, 27% preferred housing in North Dallas, and 11% preferred housing parts of Dallas "Other" than those listed [plaintiffs' 9/27/94 exhibit # 91].

C.2. DHA shall provide the mobility services to African-American applicants for DHA's low income housing programs and class members necessary to achieve and maintain a percentage of DHA's Section 8 allocation in predominantly white areas of the Dallas suburbs and a percentage of DHA's Section 8 allocation, including those in the suburbs, in predominantly white areas of North Dallas, predominantly white other parts of Dallas County, and predominantly white adjoining areas. The percentages shall be set after completion of another survey of the area preferences of DHA's applicants and participants. DHA and plaintiffs shall attempt to agree on the contractor for the survey and the content and procedure of the survey. In the event such agreement cannot be reached, the Court will determine any issues upon which there is no agreement.

The results of the survey shall be considered by DHA and the plaintiffs in their proposals for the target percentages for the mobility program. If agreement cannot be reached, the Court will set the target percentages. These percentages shall be achieved within four years of the date of the order setting the targets and maintained thereafter.

C.3. The mobility services provided shall include landlord recruitment, FMR and voucher payment levels, child care and transportation services, and Title VIII enforcement actions. The mobility services provided by DHA shall include the provision of neighborhood specific information on crime rates, objective indicators of school quality such TAAS results for the schools in the area, social services, job training and employment opportunities, day care, medical facilities, neighborhood shopping services, transportation, and environmental hazards or other conditions inimical to family life.

C.4. DHA's ability to provide the mobility services and achieve the target percentages depends on the availability of funding for the provision of those services, the availability of willing landlords with units in appropriate areas, the Fair Market Rent and voucher payment standard levels, and the choices of the program participants. The need to avoid concentrations of assisted persons in individual locations shall also be taken into account in determining DHA's performance in achieving the target percentages.

C.5. DHA shall conduct quality control review inspections of at least 10% of all Section 8 EHP units within 90 days after the initial or annual Housing Quality Standards inspection and comply with all HUD HQS requirements.

Vestige D. The neighborhood conditions for a majority of the black Section 8 participants are substantially inferior to the conditions in which low income whites receive HUD assisted housing and to the conditions in which whites paying rent comparable to the total rent paid by and on behalf the Section 8 households reside [plaintiffs, 9/27/94 exhibits ## 70-73, 76, 78].

D.1. DHA shall conduct perimeter inspections of all Section 8 EHP units at least twice annually, noting all obvious code violations on surrounding properties and reporting those violations to appropriate city code officials.

D.2. DHA shall monitor criminal activity, including criminal drug related activity, at and around all apartment projects in which 10 or more DHA Section 8 participants reside. A level of criminal activity at rates higher than the overall City of Dallas rates for any category of crime which level exists for more than six months shall be grounds for refusing to approve any additional Section 8 contracts at that project and for relocating those Section 8 participants in residence.

E. Monitoring and reporting

E.1. DHA shall file quarterly reports detailing the status of compliance with each provision of this order and specifically reporting the results of that compliance.

E.2. The report for each quarter shall he filed with the Court and copies served on the parties within thirty days of the end of the quarter covered by the report.

E.3. DHA shall give Plaintiffs' counsel access upon request and upon reasonable terms to information and documents relevant to compliance with the decree.

F. Jurisdiction of the Court

F.1. The Court retains jurisdiction to enforce and modify this injunction according to general equitable principles.

F.2. Should DHA choose to assert that unitary status has been achieved, then DHA shall submit to the Court, with a copy to all other parties, a detailed, factual account upon which the assertion is based and all documents upon which the assertions are based. The account shall include: all steps taken to eradicate the vestiges of racial segregation, any publicly assisted housing desegregation procedures which were not used and the explanation for the failure to use those procedures, the basis upon which the party relies for the assertion that no further action to remove the vestiges of racial segregation is practical or required, whether or not actions by an organization, entity, or person other than DHA could further desegregation, what such actions are and the steps taken by DHA to secure the performance of such actions and the results of those steps, and any other information relevant to the determination of unitary status.

F.3. Unitary status means that the all reasonable methods have been employed and all available resources marshalled to eradicate the vestiges of racial segregation in DHA's public housing and Section 8 housing programs, and that such vestiges have been eradicated to the extent practical.

7 Feb 95
Date

/s/ Jerry Buchmeyer
United States
District Judge

Supreme Court, U.S.
FILED
APR 8 2003
CLERK

No. 02-1282

In The
Supreme Court of the United States

THE HOUSING AUTHORITY OF THE CITY OF DALLAS,

Petitioner,

vs.

HIGHLANDS OF MCKAMY IV AND V COMMUNITY IMPROVEMENT ASSOCIATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE TEXAS ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a civil rights defendant's compliance with a court order is a "special circumstance" prohibiting the award of attorney's fees under 42 U.S.C. §1988.

2. Whether "prevailing party" status is justified for rewording a court order as opposed to a material recovery of the relief sought.

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INTEREST OF THE TEXAS ASSOCIATION OF COUNTIES, *AMICUS CURIAE*

The Texas Association of Counties is a Texas non-profit corporation with 254 Texas counties as members. Represented on the Board of Directors of the Texas Association of Counties ("TAC") are the following associations: the County Judges and Commissioners Association, the North and East Texas Judges' and Commissioners' Association, the South Texas Judges' and Commissioners' Association, the West Texas Judges' and Commissioners' Association, the Texas District and County Attorneys' Association, the Sheriff's Association of Texas, The County and District Clerks' Association of Texas, the Texas Association of Tax Assessor-Collectors, the Texas County Treasurers' Association, the Justice of the Peace and Constables' Association of Texas, and the County Auditors' Association of Texas.[1]

TAC and its representative entities are actively engaged in government operations, with limited public funding and divergent constituents. It is imperative that TAC rely upon court orders without fear, prejudice or punishment. The public funding necessary for these operations should not be diverted due to poorly worded, unequally enforced statutes. TAC must be able to confidently rely upon the legal standards used to award attorney's fees.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in the whole or in part. No person nor entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. Sup. Ct. R. 37.6.

STATEMENT OF FACTS

This is a civil rights institutional reform case brought by African-Americans who complained of racial discrimination in the administration of Petitioner's, The Housing Authority of the City of Dallas ("DHA", "Housing Authority") public housing programs. The district court had federal question jurisdiction over this case pursuant to 28 U.S.C. §1331. The district court found the Housing Authority liable and, among other things, ordered the Housing Authority to buy or build public housing in "predominantly white areas."

Complying with the district court's order, DHA bought two unimproved tracts in a predominantly white area ("the Sites"), and announced plans to build a small apartment complex on each tract. The Respondents, a group of homeowners living nearby ("the Homeowners"), challenged the Remedial Order and sought injunctive relief to prevent the construction of public housing in their neighborhood. The district court rejected the Homeowners' claim that the Remedial Order discriminated against them on the basis of their race (predominantly white), and denied relief to the Homeowners. The Homeowners appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit in Case 97-11083.

On March 16, 1999, the Fifth Circuit held that the application of the "predominantly white" requirement deprived the Homeowners of their Constitutionally protected right to equal protection; the Circuit Court reversed the district court and remanded with instructions to eliminate the "predominantly white" requirement from the Remedial Order. The Circuit Court did not, however, enjoin the construction of public housing on the Sites; the

court instead held that its opinion does not preclude the construction of public housing on the Sites, provided the Sites are selected by means of non-racial criteria.

The Homeowners then sought attorney's fees relating to their action for injunctive relief and their appeal of the district court's order denying injunctive relief. After an evidentiary hearing, the magistrate judge recommended denial of the motion for attorney's fees, and the district judge adopted the findings, conclusions, and recommendations of the magistrate judge. The Homeowners appealed from the district judge's order denying attorney's fees.

On appeal, the Housing Authority argued that the Homeowners were not entitled to attorney's fees because (1) the Homeowners did not get the injunctive relief they sued for and, therefore, were not a prevailing party within the meaning of §1988; (2) attorney's fees should not be imposed on DHA when it did nothing more than obey the district court's order; and (3) the Homeowners failed to prove the amount of their fees.

The Court of Appeals reversed, finding that (1) although the Homeowners failed to get the injunctive relief they sued for, they were a prevailing party because they forced the district court to revise the Remedial Order; and (2) the fact that DHA was forced to apply the "predominantly white" requirement at the risk of imprisonment and fine was not a "special circumstance" that would render the imposition of attorney's fees unjust, because (i) "a state actor's good faith compliance with an official or legal requirement that is unconstitutional is not a special circumstance that justifies the denial of attorney's fees"; (ii) "DHA did not litigate the unconstitutional terms of the Remedial Order; it instead chose not to contest the Walker

plaintiffs' motion for summary judgment"; and (iii) "it seems particularly inappropriate to deny the Homeowners attorney's fees because the DHA acquiesced to a remedy that infringed upon the Homeowners' rights." *Walker, et al. v. City of Mesquite, et al.*, 313 F.3d 246, 251 (5th Cir. 2002).

SUMMARY OF ARGUMENT

The compliance with a court order, in a civil rights case, is a special circumstance that prohibits the award of attorney's fees under 42 U.S.C. §1988. Any decision to the contrary plainly warrants this Court's review and jeopardizes the authority of the judicial system. This Honorable Court should grant review to determine the recovery necessary for "prevailing party" status. It is not enough to *reword an order*; the relief rewarded must be material to the relief sought.

ARGUMENT

I. The compliance with a court order, in a civil rights case, is a special circumstance that prohibits the award of attorney's fees under 42 U.S.C. §1988. Any decision to the contrary plainly warrants this Court's review and jeopardizes the authority of the judicial system.

Title 42 of the United States Code §1988, provides, in part, that:

> "In any action or proceeding to enforce the provision [Section] . . . 1983 . . ., the Court in its

> discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost. . ."

The statute allows for a discretionary award of attorney's fees to a "prevailing party" unless "special circumstances" would make such an award unjust. 42 U.S.C. §1988 (2002); *Newman v. Piggie Park Ent., Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966 (1968). This legislation was passed to ensure the uniform application of the civil rights laws. Congress intended to achieve consistency among the various circuits and this Honorable Court. S. Rep. No. 94-1011,1N4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909 and 5912; *See also* H. Rep. No. 94-15581, 3 (1976).

To date, the Federal Courts have failed to achieve the consistency in our civil rights laws previously mandated by Congress. There is no standard or guideline for the "special circumstances" exception among the various Federal Circuits and this Honorable Court. There are no guidelines at all in the Third or Sixth Circuits where the "special circumstances" exception was found to justify a denial of attorney's fees. The First, Second, Fifth and Ninth Circuits apply varying standards with varying results. The Third, Seventh and Tenth Circuits reject the current standard for the "special circumstances" exception employed in the Second Circuit. Further, the First Circuit has explicitly rejected the Ninth Circuit's "balancing of equities" approach.[2] Accordingly, the legislative

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[2] *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997); *Kerr v. Quinn*, 692 F.2d (2d Cir. 1982); *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 557, 558-59 (5th Cir. 1998); *Bauer v. Sampson*, 261 F.3d 775,785-86 (9th Cir. 2001); *Seattle School Dist. No. 1 v. State of Washington*, 633 F.3d 1338, 1348 (9th Cir. 1980); *Cunningham v. City of McKeesport*, 753 F.2d 262, 268 (3d Cir. 1985),

(Continued on following page)

consistency commanded by Congress is sorely lacking in the Federal Courts.

This litigation is an excellent example of the confusion in our judicial system. In the case at bar, DHA has been involved in litigation for approximately 18 years. In March of 1992, a 1987 consent decree was vacated and eventually a remedial order was entered in February 1995 affecting DHA. This order, among other things, directed the Housing Authority to buy or build public housing in "predominantly white areas." The term "predominantly white area" was defined as less than 37% Hispanic, Black or other minority. After so many years of court intervention, expense and litigation, DHA merely complied with this order. The Homeowners filed this suit against DHA to enjoin the construction of two new 40-unit public housing projects on sites adjacent to their neighborhoods. Respondents sought to prevent DHA from acquiring sites, or in the alternative, from constructing public housing in their neighborhoods.

As a result of the Homeowner's litigation, the terms of the Remedial Order have been modified; but, the spirit of the pronouncement has not changed in the least. DHA, in its discretion, may continue to develop public housing on the previously purchased sites. Nevertheless, the Fifth Circuit Court of Appeals ruled that the Homeowners were the "prevailing parties" and the "special circumstances"

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vacated and remanded on other grounds and reinstated, 807 F.2d 49 (3d Cir. 1987) ("the statute contains no contingent fee exception"); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982); *Cooper v. Singer*, 719 F.2d 1496, 1501-02 (10th Cir. 1983), *abrogated on other grounds, Venegas v. Mitchell*, 495 U.S. 82, 110 S. Ct. 1679 (1990).

exception was inapplicable. The issue here is whether DHA operated under "special circumstances" that would render an award of attorney's fees unjust.

This Honorable Court requires parties to comply with court orders even if there might be grounds to object to the court order or if the order is subject to substantial constitutional question.[3] To defy a court order may subject the defiant to monetary fines and/or criminal contempt, even though the order may be set aside on appeal. In this way, litigants must place complete confidence in the judicial mandates that emanate from litigation. Where judicial orders are concerned, there is no right of defiance beyond a timely appeal.

The ethical rules of professional conduct also require proper compliance with court orders. For instance, the Texas Disciplinary Rules of Professional Conduct, Rule 3.01; Local Rules of the Northern District of Texas, LR 83.8; and *Dondi Properties Corp v. Commerce Sav. & Loan Ass'n*, 121 FRD 284, 286 (N.D. Tex. 1988). These rules are mirrored throughout our judicial system.

It is not proper to punish a party for complying with a Court's order. To award attorney's fees against a compliant party is unjust. This Honorable Court should grant review to clearly delineate the "special circumstances" necessary to render an award of attorney's fees unjust. This Court

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[3] *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386, 100 S. Ct. 1194, 1201 (1980); *Walker v. City of Birmingham*, 388 U.S. 307, 314-315, 87 S. Ct. 1824, 1828-1829 (1967); *United States v. United Mine Worker's of America*, 330 U.S. 258, 293, 67 S. Ct. 677, 695-696 (1947).

cannot allow the lower court's decision to punish parties for complying with the Court orders.

II. This Honorable Court should grant review to determine the recovery necessary for "prevailing party" status.

The Homeowners sued for an injunction prohibiting and restraining DHA from developing public housing in their neighborhoods. The Homeowners were initially denied "prevailing party" status by the District Court. This decision was reversed on appeal to the Fifth Circuit. The Appellate Court ordered the removal of the phrase "predominantly white area" in a remedial order. This modification did not affect the spirit of the prior remedial order and its author's intent. DHA was allowed to continue, granted on a race-neutral basis, with its development activities. Even now, the Housing Authority may, in its discretion, develop the litigated parcels of land. The Homeowners' effort to stop DHA's development completely failed.

The Homeowners have not "prevailed" in any material or realistic way. The moral satisfaction that results from any favorable statement or re-statement of the law cannot bestow prevailing party status. *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566 (1992); *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S. Ct. 2672 (1987).

To allow the Appellate Decision to stand, controverts this Court's previous rulings and allows the form of a Court's order to overwhelm the substance of United States Law. This issue deserves review by this Honorable Court.

CONCLUSION

The compliance with a court order, in a civil rights case, is a special circumstance that prohibits the award of attorney's fees under 42 U.S.C. §1988. Any decision to the contrary plainly warrants this Court's review and jeopardizes the authority of the judicial system. This Honorable Court should grant review to determine the recovery necessary for "prevailing party" status. It is not enough to reword an order; the relief rewarded must be material to the relief sought.

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